Supreme Court of the United States

OCTOBER TERM, 1947

No. 184 - 189

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, *et al.*, as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, *et al.*, JOHN C. TRAPHAGEN, *et al.*, JAMES G. BLAINE, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN GERDES,
1 Wall Street,
New York, New York.

HENRY F. TENNEY,
120 South La Salle Street,
Chicago, Ill.

Counsel for Debtor-Petitioner.

New York, New York, July 2, 1947.

INDEX

CITATIONS

Cases:

Statutes:

Supreme Court of the United States

OCTOBER TERM, 1947

No.....

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, *et al.*, as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, *et al.*, JOHN C. TRAPHAGEN, *et al.*, JAMES G. BLAINE, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Chicago, Rock Island & Pacific Railway Company, debtor in the above proceedings for its reorganization under Section 77 of the Bankruptcy Act, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit

entered February 21, 1947, which judgment reversed an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 28, 1946, directing that the plan of reorganization of the debtor and its debtor subsidiaries should not be confirmed and that the case should be referred for further proceedings to the Interstate Commerce Commission pursuant to Section 77 (e) of the Bankruptcy Act, and to review the order of said Circuit Court entered April 7, 1947, denying the debtor's petition for a rehearing.

Opinions Below

The opinion of the district court (R. 249-53) has not yet been reported. That of the Circuit Court of Appeals (R. 332-43) is reported in 160 F. 2d 942.

Jurisdiction

The judgment of the circuit court of appeals was entered February 21, 1947 (R. 344-52), and its denial of the debtor's petition for rehearing was entered on April 7, 1947 (R. 354). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, which is made applicable by Section 24 (c) of the Bankruptcy Act.

The three months' period limited by 28 U. S. C. § 350 within which a petition for certiorari must be filed does not commence to run until denial of a petition for rehearing. *United States* v. *Seminole Nation,* 299 U. S. 417 (1937); *Department of Banking* v. *The Pink,* 317 U. S. 264 (1942); *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498 (1927).

Question Presented

The two *Denver* cases (328 U. S. 495 and 329 U. S. 607) delineated the conditions under which a district court in reorganization proceedings under Section 77 may confirm a plan despite its being rejected by one or more classes of

creditors. This case presents the cognate and equally important question: Under what circumstances may a district court refuse to confirm a plan which has been rejected by one or more classes of creditors?

Statute Involved

The pertinent provisions of Section 77 of the Bankruptcy Act, 47 Stat. 1474 (1933), as amended 49 Stat. 911 (1933) and 49 Stat. 1969 (1936), 11 U. S. C. § 205, are set forth in the Appendix, *infra*, pp. 33-37.

Statement

The plan of reorganization of the debtor was approved by the Interstate Commerce Commission on May 1, 1944, and approved by the district court on June 15, 1945. Subsequently, the district court directed the Commission to submit the plan for acceptance or rejection to eleven classes of creditors. On February 26, 1946, the ICC certified to the court that the plan had been rejected by two classes of creditors: The holders of the Little Rock & Hot Springs Western First Mortgage Bonds, by an adverse vote of over 80% (class 21-A, R. 98; also R. 243), and the holders of the Convertible 4½ Bonds, by an adverse vote of over 75% (class 14, R. 96; also R. 243). The Convertible bondholders are an unsecured group. Under the rejected plan, with the value of each share of new common stock taken to be $50 (the value assumed in allotting such shares under the plan to the holders of old senior bonds), the claims of these Convertible bonds, aggregating $47,297,168 as of January 1, 1944, after deduction of cash paid, were recognized only to the extent of $8,003,907—17% of the amount of their claims.

After certification by the ICC that the plan had been rejected, the district court held a hearing on confirmation, and on June 28, 1946, decided that conditions affecting the

debtor had not been anticipated correctly, that their unforeseen change warranted a reconsideration of the plan by the Interstate Commerce Commission, and that the aforesaid two classes of bondholders had acted reasonably in rejecting the plan.

In the memorandum opinion of the district court it was stated (R. 252):

> "In the present case we have a plan that except for slight modifications was prepared by the Commission in 1940 and rests on studies of earnings, etc., going back to 1937 and even beyond.
>
> "Against that we find the Debtor today with cash or equivalent of over $70,000,000; with an R. F. C. loan aggregating, principal and interest in excess of $18,000,000 paid in full; with the entire first mortgage of the Peoria Terminal Co., to all intents and purposes paid in full; with over 20% of the Choctaw & Memphis first mortgage retired; and with an amazing reduction, in the interim, of equipment debt. Three classes of creditors set up in the original plan have disappeared—the banks, the R. F. C., and the Peoria Railway Terminal Co.
>
> "The above recital does not take into account the tremendous sums expended over the period on improvement of road and equipment, nor does it include the retirement of debt on jointly owned facilities such as the Joliet and Denver terminals."

The district court in its order denying confirmation (R. 254-5) concluded "(a) that the Plan does not make adequate provision for fair and equitable treatment for the interests or claims of the holders of the Convertible Bonds, (b) that the rejection of the Plan by the holders of the Convertible Bonds was reasonably justified in the light of the respective rights and interests of the holders of the Convertible Bonds and all the relevant facts, (c) that the Plan does not conform to the requirements of clause (1) of

the first paragraph of subsection (e) of Section 77 of the Bankruptcy Act, as amended, in respect of its treatment of the Convertible Bonds, and (d) that the Plan should not be confirmed." (R. 254-5.)

Senior bondholder groups, largely composed of banks and institutional investors, appealed (R. 258-77) from the district court's order refusing confirmation and referring the case to the ICC for reexamination, and on February 21, 1947, the Seventh Circuit Court of Appeals reversed the district court, vacating its said order and directing it to confirm the plan (R. 344-52).

The circuit court erroneously assumed that this Court in the *Denver* cases* held that a district court is compelled to exercise its "cram-down" power, despite the adverse votes of classes of creditors, in every case in which the district court or an appellate court has held, by approving the plan, that it was fair and equitable; thus failing to note that the statute in no event *requires* use of the "cram-down" power, but only *permits* it, and then only after the district court affirmatively finds (1) that the plan is fair and equitable in the light of changed conditions and (2) that the rejection was not reasonably justified in the light of all the relevant facts.

Citing the first *Denver* case, the circuit court said, "Thus it is clear that the court's discretion [under Section 77(e)] is not unlimited, but is circumscribed, and until the statute is satisfied, no discretion is vested in the court"—to confirm the plan, the circuit court should have added. (R. 336, 160 F. 2d 942, 945.) Instead, the court used the quoted sentence—which is the major premise of the *Denver* cases—to deny the district court any discretion to do otherwise than "cram-down" the rejected plan by confirmation, despite adverse class votes, solely because the plan had previously been approved by the Commission and district court.

---

* 328 U. S. 495; 329 U. S. 607.

The circuit court's opinion further misapplied the *Denver* cases:

> "Regarding changed economic conditions after approval of a plan (which is the nub of our problem), the Supreme Court said: 'Changes in economic conditions cannot effect the powers of the reorganization agencies even though such changes may require a reexamination into the present fairness of the former exercise of those powers.' [First *Denver* case] 328 U. S. 512, 66 S. Ct. 1291. *To us this statement means that changes in economic conditions cannot be used as a wedge to have the Commission reexamine its former valuation figures.* This quoted statement would appear to be conclusive of our problem, since this court examined the plan in the manner prescribed in *Ecker* v. *Western Pacific RR.*, 318 U. S. 448, and *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. R.*, 318 U. S. 523, and by affirming the order approving the plan, established that the plan was fair and equitable" (160 F. 2d 942, 947). (Emphasis supplied.)

Despite the Supreme Court's clear statement to the contrary, the circuit court used that very statement to hold that as a matter of law unanticipated changes in financial conditions subsequent to approval of a plan are not a basis for a refusal of confirmation and a reexamination of the present fairness of the plan. So to hold obviously renders confirmation a mere form which may well be dispensed with entirely.

In the circuit court's entire opinion, no attempt was made to consider the new facts presented to the district court by the debtor or to rebut any of the debtor's arguments, nor in fact was any mention made of them although they had been fully briefed and argued to the court.

After entry of the circuit court's order of reversal, the debtor applied to the district court for a stay of confirmation pending the filing of the present petition for a writ

of certiorari. This application was denied on the ground that the district court did not have authority to grant such relief. A motion made by the debtor to the circuit court to recall its mandate and stay further proceedings until the Supreme Court should have passed upon the instant petition was denied on May 20, 1947. In accordance with the mandate of the circuit court, the district court confirmed the plan on May 23, 1947.

Reasons for Granting the Writ

The circuit court considered—and the debtor agrees—that the basic question before it was whether under Section 77(e) the district court was justified in refusing to confirm the rejected plan of reorganization. It is the debtor's position that in holding the district court to be without discretion to refuse confirmation under the circumstances here existing, the circuit court erroneously construed Section 77(e) and mistakenly applied the *Denver* cases.

POINT I

The District Court possesses plenary discretion to order the reexamination of a plan after such plan has been rejected by vote of one or more classes of creditors.

Section 77(e) provides that the district judge "*shall*" confirm the plan if accepted by a two-thirds vote of each class of creditors and by a majority vote of each class of stockholders entitled to vote upon confirmation. If any class entitled to vote fails to accept by the required vote, the judge "*may* NEVERTHELESS" confirm the plan if he is "satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights

and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)".

An analysis of these provisions shows:

1. The judge *must* ("shall") confirm the plan if accepted by the necessary votes of all classes of creditors and stockholders entitled to vote.

2. Normally, rejection by vote of any class entitled to vote will result in a failure of confirmation.

3. However, the judge "*may*" in his discretion,* "*nevertheless*" (despite the adverse vote) confirm a plan which has been rejected by an adverse vote, but only "if he is satisfied" [is convinced**] and "finds, after hearing" that *each* of the following conditions is met:

(a) the plan "makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it";

(b) the "rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts"; and

---

* "And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See United States v. Thomas, 156 U. S. 353, 360." *Anderson* v. *Yungkau*, 329 U. S. 482, 485.

** "To 'satisfy' is 'to free from doubt, perplexity, or suspense; to set the mind at rest; to convince;' and one of the synonyms given is to 'convince the understanding'. While one person may be satisfied of the truth of a matter upon a mere scintilla of evidence, and another require that all doubt be removed before it is shown to be true to his satisfaction, it cannot be said that one is satisfied—that his understanding is convinced—of the truth of the matter in respect of which he entertains a reasonable doubt." *Rolfe* v. *Rich*, 149 Ill. 436, 439.

(c) the plan "complies with the provisions of subsection (b) of this section [section 77], is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders" [section 77(e)].

4. If the plan has been rejected by the vote of any class of security holders whose vote is required, and if the judge has *any* doubt as to *any* matter referred to in subparagraphs (a), (b) and (c) of the preceding paragraph hereof, the judge *must* ["shall"] "enter an order in which he shall either dismiss the proceedings, or, in his discretion • • • refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans" [section 77(e)].

5. Even if the judge is personally convinced of the existence of the facts which vest in him the power to confirm the plan despite adverse class rates, he is not *required* to confirm; he "may", in his discretion, nevertheless refer the plan to the Commission for further consideration.

The judicial power given in Section 77 to confirm a plan under which dissenting classes of creditors may be compelled to take long term bonds or shares of stock is unique. This power was *not* possessed by the court in a "composition" agreement with a bankrupt under the old Bankruptcy Act.[1] The power is *not* possessed by the court: in an equity receivership[2]; a proceeding for an Agricultural Composi-

[1] Under old Section 12(b) the court could not consider confirmation of the proposed "composition" unless it had been accepted in writing by a majority in number of creditors holding a majority in amount of claims.

[2] Dissenters are entitled to receive in cash their pro rata portions of the net proceeds of a sale of the debtor's property. *Guaranty Trust* v. *Seaboard*, 60 F. Supp. 607, 615; *Coriell* v. *Morris White*, 54 F(2d) 255, 260.

tion and Extension under Section 75 of the Bankruptcy Act[3]; a proceeding for the Composition of Municipal Indebtedness under Chapter IX of the Bankruptcy Act[4]; proceedings for Corporate Reorganizations under Section 77B or Chapter X of the Bankruptcy Act[5]; a proceeding for an Arrangement under Chapter XI of the Bankruptcy Act[6]; a proceeding for a Real Property Arrangement under Chapter XII of the Bankruptcy Act[7]; or a proceeding for a Wage Earners Plan under Chapter XIII of the Bankruptcy Act.[8] Prior to amendment of the Section in 1935, the court did not have the power in a proceeding under Section 77.

Under the English reorganization statute, a "scheme of arrangement" may be confirmed only after it has received the assent in writing of "three-fourths in value" of the claims of each class (The Railway Companies Act, 1867, 30 and 31 Vict., c. 127, § 12). Similarly, in Canada, the assents of the holders of three-fourths of the total claims

---

[3] Section 75(g) requires acceptance by a majority in number of creditors holding a majority in amount of claims before the court may consider confirmation of a plan. Without such acceptance, dissenters are entitled to receive cash for the value of their interests [Section 75(s)].

[4] Section 83(d) requires that two-thirds of the claims of all classes must accept the plan in writing before it may be confirmed by the court.

[5] In each of these proceedings, two-thirds of each class of creditors must accept the plan in writing before the court can consider its confirmation [Section 77B(e); Section 179]. Dissenting classes are bound by a plan only if it provides for payment of the value of their interests in cash or there is a continued recognition of their old claims [Sections 77B(b)(5) and 77B(e); Section 216(7); *In re Granville & Winthrop Bldg. Corporation*, 87 F(2d) 101, 102, 103, Seventh Circuit; *In re Murel Holding Corporation*, 75 F(2d) 941, 942, Second Circuit].

[6] In these proceedings, acceptance of the plan by each class of creditors by a majority in number of creditors holding a majority in amount of claims is required before the court may consider confirmation of the plan [Sections 362, 468 and 652].

in each class must be secured (Canadian Act of 1919, c. 68, §§ 155-159; Rev. Stat. of Canada, 1927, c. 170).

The basis for this general requirement that creditors may be bound to a plan of reorganization only by the action of the holders of a majority, two-thirds, or three-fourths, of the claims of their class, was stated by the Supreme Court in the well known and frequently cited case of *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527, as follows (pp. 534, 535, 536):

> "*In Gilfillan* v. *Canal Co.*, at the present Term, it was said that holders of bonds and other obligations issued by large corporations for sale in the market and secured by mortgages to trustees, or otherwise, have, by fair implication, certain contract relations with each other. In England, we infer, from what was said by Lord Cairns in *Cambrian Railways Company's Scheme, supra*, they are considered as in a sense part proprietors of the existing capital of the company, and dealt with by Parliament and the courts accordingly. They are not there, any more than here, corporators, and thus necessarily, in the absence of fraud or undue influence, bound by the will of the majority as to matters within the scope of the corporate powers, but they are interested in the administration of a trust which has been created for their common benefit. Ordinarily their ultimate security depends in a large degree on the success of the work in which the corporation is engaged, and it is not uncommon for differences of opinion to exist as to what ought to be done for the promotion of their mutual interests. In the absence of statutory authority or some provision in the instrument which establishes the trust, nothing can be done by a majority, however, large, which will bind a minority without their consent. Hence it seems to be eminently proper that where the legislative power exists, some statutory provision should be made for *binding*

the minority in a reasonable way *by the will of the majority.* * * *

"The confirmation and legalization of 'a scheme of arrangement' under such circumstances, is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, *if assented to by the required majority of creditors, is made binding on the non-assenting minority* * * *."

The "cram down" provision of Section 77 is therefore an important departure from all other reorganization procedures. It grants an unusual power to the district judge—a power which should be exercised by him only in the extraordinary situations in which such exercise becomes necessary to avoid a destruction of the interests of others.

The intent of those who sponsored the "cram down" amendment of 1935 is shown in the January 21, 1935 report of Joseph B. Eastman, Federal Coordinator of Transportation, which directly resulted in the introduction of the amendatory bill:

"Arbitrary compulsion of plans over the dissents of the interested classes is not intended, nor is it believed that the courts will override *strong dissents* by any large number of such classes, or by a single *large* class, excepting where it is established that they have no interest in the property. Rather, the purpose is to prevent the obstruction of plans which are favored by the larger classes of creditors or stockholders, but which are obstructed by *minorities* in the *smaller classes* in the attempt to secure unduly preferential treatment." (Emphasis supplied.)

The issue before the district judge was whether to confirm the plan in the fact of the rejection by approximately 76% of the owners of the Convertible 4½% Bonds and by 81% of the holders of the Little Rock & Hot Springs West-

ern Bonds. It is thus clear that the judge was not dealing with failures by small margins to get the necessary two-thirds vote of each class—not with a rejection by *small minorities* of these two classes of creditors—but with rejections by *large majorities* of each of these classes. It should also be borne in mind that the Convertible 4½% Debenture issue aggregates more than $32,000,000 in principal amount, and represented a total claim as of the date of the hearing, including interest, of approximately $50,000,000. Thus the district court was not dealing with a situation affecting only a *minority* of a *small issue.*

Section 77 recognizes the unusual nature of the "cram down" power granted to the judge and carefully safeguards its exercise. The judge "may" use the power only if he is convinced, beyond a reasonable doubt, that the rejection has been unreasonable, that the plan makes adequate provision for fair and equitable treatment for the interests of the rejecting classes, and that the plan is generally fair and equitable.

Even where the judge believes the necessary facts exist, he is not *required* to exercise his "cram down" power. The reason for this is clear. Findings as to the reasonableness of a rejection, as to whether certain classes of creditors have received fair and equitable treatment, and as to whether the plan is fair and equitable, "rest in the realm of judgment rather than mathematics", and "there is an area for disagreement" (*Milwaukee* case, 318 U. S. 523, 564). Recognizing this "area for disagreement", a conscientious judge, although personally convinced of the soundness of his own conclusions may nevertheless believe it equitable to submit the matter to the Commission for reconsideration. The statute gives him this discretion.

If the Commission with its broad and exclusive power to determine the values to be applied in testing the fairness of the plan, then reaffirms the old plan, no harm has been

done by its reconsideration except delay in the consummation of the plan.* On the other hand, application of the "cram down" provision would finally close the door to a further consideration of the plan; inequities in it would become irretrievably binding. To prevent this, the judge is given plenary discretion in his exercise of the "cram down" power.

The power to determine whether to "cram down" the plan upon dissenting classes of creditors or to refer the plan back to the Commission is conferred upon the judge alone. It is plain that if the district judge's refusal to confirm is appealable at all, the appellate court must refuse to disturb his determination unless it is wholly without warrant or rational basis.

In the *Milwaukee* case, 318 U. S. 523, in which the "cram down" provision was not in issue but merely the much more limited discretion of the district court in connection with "approval" of a plan, the Supreme Court nevertheless emphasized the special role of the district court as compared with the limited role of appellate courts, in the following terms (p. 564):

> "The District Court satisfied itself that the principles of priority as applied to these facts were respected. * * * Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement. But we are not performing the functions of the District Court under Section 77(e). Our role on review is a limited one. *It is not enough to reverse the District Court that we might have ap-*

---

* In this case, such delay could clearly not be prejudicial since the current net earnings of the Rock Island available for the payment of interest are considerably in excess of the amount of interest accruing on all the old indebtedness. (See Tables, Appendix, *infra*, pp. 29-31.)

praised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end." (Emphasis supplied.) See also *New Haven* case, 147 F(2d) 40, 47 (C. C. A. 2d, 1945).

It is clear that the power of an appellate court in reviewing an order of the district court refusing to confirm a plan under the circumstances before the circuit court is even narrower than as stated in the foregoing quotation. It is doubtful whether, in the absence of a showing of bad faith, an appellate court would ever be justified in reversing a district court order which refuses to apply the "cram-down" provision. Certainly, the appellate court may not substitute its judgment for that of the district court. It must sustain the district court's order unless it finds that there is no rational basis in the record for the lower court's action.

There is a strong burden on the part of any party seeking reversal of an order refusing confirmation, when there has been an adverse class vote, to prove that there is no rational basis for doubt as to the equity of the plan or the unreasonableness of the class vote of rejection. Unless there is in the record evidence sufficient to demonstrate beyond a reasonable doubt, (1) that the plan is fair and equitable under present conditions and prospects, and (2) that the dissenting classes acted unreasonably in rejecting the plan, the district court had no power to confirm; its action in refusing confirmation under such circumstances is not subject to reversal by an appellate court.

As will hereinafter be shown, the record before the district court not only justifies the controversial order, but compelled the granting of it.

POINT II

Analysis of the two Denver decisions of the Supreme Court, 328 U. S. 495 and 329 U. S. 607.

The circuit court relied greatly upon the opinions of this Court in *RFC* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495 and in *Insurance Group* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607. Those cases, however, in so far as they are applicable, clearly support the contention of petitioner.

Neither the Supreme Court nor the circuit court of appeals in the Denver cases interfered with the plenary discretion of the district court in its application of the "cram-down" power.

The district court, in the *Denver* case, after receiving evidence and hearing the parties was "satisfied" that the plan was fair and equitable and that its rejection by one class of creditors has been unreasonable. It thereupon exercised its "cram-down" power by confirming the plan. Appeal was taken to the circuit court of appeals.

The controversy did not involve, as in this *Rock Island* case, the effect of changes in conditions after approval of the plan. As stated by the Supreme Court (328 U. S. 495, 534):

> "The challenge to the reasonableness or the unreasonableness of the rejection of the plan is *not based on any change of conditions* since its approval by the District Court October 25, 1943." (Emphasis supplied.)

The facts found by the district court were not challenged. The circuit court reversed the district court solely because, as a matter of law, it held that the plan was not fair and equitable, saying:

> "Under the *admitted facts* of the case, whether the plan complies with the requirement of Section 77, sub.

e, presents a pure *question of law,* and we are in no wise bound by the legal conclusions of the District Court in this respect. It is our conclusion that the plan fails to meet the requirements of Section 7, subd. e, in that it fails to make equitable distribution of the surplus cash and current assets on hand; fails to make equitable provisions for the distribution of the excess war profits which may reasonably be expected to accrue; fails to make equitable and fair distribution of that part of the capitalized value represented by the securities set aside for the Junction Bonds." *In re Denver & R. G. W. R. Co.,* 150 F. (2d) 28, 40. (Emphasis supplied.)

As stated by the Supreme Court (328 U. S. 495, 504):

"The reversal came from the Circuit Court's holding, contrary to the Commission and the District Court, that free cash in excess of operating capital needs and large earnings from war business after the date of the plan should be for the benefit of the General bondholders. 150 F. 2d 35-38. That court further held that decreases in debt by cash payments, with the consequent reduction of securities that were required to be issued under the plan to cover such debt claims, should inure to the benefit of the same General bondholders. 150 F. 2d 38-39. The Circuit Court disagreed also with the treatment of certain collateral deposited behind the First Consolidated Mortgage of the Rio Grande Western Railway Company and secondarily behind other issues of the debtor. This is the Utah Fuel stock issue hereinafter discussed. These differences from the conclusions of the District Court led the Circuit Court to hold that the General bondholders were 'reasonably justified' in rejecting the plan and that the District Court was without authority to confirm the plan over their veto. § 77(e)."

The Supreme Court overruled the holdings of the circuit court on the foregoing questions of law (328 U. S. 495, 534):

> "A rejection would not be reasonably justified unless the dissenters had a valid reason for their vote. As is shown by Judge Symes' discussion of their objections to confirmation, their reasons were the payment of the senior obligations with consequent claimed release of capitalization for junior securities and the inadequate valuation, particularly in view of the large additions to plants from earnings. We think that we have demonstrated that there was an adequate basis for the valuation, * * *, and that the decreases in senior debt were not for the account of the junior creditors. * * * *Respondents offer no other ground for their votes in rejection.*" (Emphasis supplied.)

The Court held that rejection is not reasonably justified if based *solely* on *legal grounds* which are not sound (328 U. S. 495, 535):

> "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection. If *only* those elements are relied upon, *as here*, the rejection is not reasonably justified." (Emphasis supplied.)

Mr. Justice Frankfurter dissented from the opinion of the Court on the ground that a rejection may be reasonable, under the unusual conditions which have prevailed in the railroad world during the past few years, even though based on specific grounds of law which are without validity.

No member of the Supreme Court, and no member of the circuit court, directly or indirectly indicated in the first *Denver* case that an appellate court has power to

reverse a finding of fact by the district court, which has material support in the record, that changed conditions make it equitable to send the plan back to the Commission for reconsideration. On the contrary, both circuit and Supreme Courts emphasized the limited power of appellate courts to review findings of fact of the district court—a power "only to ascertain whether the District Court performed its judicial functions under Subsection e, and whether its conclusions find support in the record":

> "On appeal, our scope of review is more limited than even that of the District Court. We inquire only to ascertain whether the District Court performed its judicial functions under Subsection e, and whether its conclusions find support in the record. *We may not reverse the District Court merely because we would have reached a different conclusion.* As stated by the Supreme Court, 'If there is warrant for the action of the District Court, our task on review is at an end'. *Group of Investors* v. *Milwaukee, supra.*" (150 F. (2d) 28, 36.) (Emphasis supplied.)
>
> "In view of the District Judge's familiarity with the reorganization, this finding has especial weight with us. See Rule 52, Federal Rules of Civil Procedure." (328 U. S. 495, 533.)

The applicable portion of Rule 52(a) of the Federal Rules of Civil Procedure, referred to in the foregoing statement of the Supreme Court, follows:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially * * * Findings of fact shall not be set aside *unless clearly erroneous* * * *." (Emphasis supplied.)

The issues presented to the circuit and Supreme Courts in the first *Denver* case were wholly different

from that presented herein to this Court. In that *Denver* case the courts were considering the circumstances under which an appellate court is warranted in reversing an exercise of the "cram-down" power by a district court, while in this case the problem is whether under any circumstances the district court can be *compelled* to exercise its "cram-down power" when it has *not* been "satisfied" that rejection of the plan was unreasonable, and if it may be compelled, the circumstances which would warrant such compulsion.

The statute requires that the district court must be "satisfied". If it is not satisfied, the statute makes no other provision for cramming the plan down upon dissenting classes of creditors. Such power is not given to appellate courts.

If there is *any* power to review the district court's conclusion that it is not "satisfied" that the rejection is unreasonable, the field of review must be much more restricted than the review of an exercise of the "cram-down power", as in the first *Denver* case.

Under the statute, failure of the district court to be "satisfied" is of itself sufficient to compel a reconsideration of the plan by the Commission. The burden of "satisfying" the court is upon those who seek to "cram down" the plan on the dissenting classes.

The second *Denver* case did not involve the "cram-down" provisions of the statute, but the right of a debtor to the reexamination of a reorganization plan *after* its confirmation. So far as applicable, the case sustains the contentions made herein by the petitioner. The district court's exercise of discretion was affirmed, and its reversal by Judge Phillips was set aside. The findings of fact of the district court, which Judge Phillips had apparently rejected, were adopted by the Supreme Court.

In the present *Rock Island* case, the circuit court has made no new findings of fact. It reversed the district court for its alleged "error of law" (160 F. 2d 942, 949) without showing the district court's findings of fact to be clearly erroneous, and has compelled confirmation of the plan, though the district court is not "satisfied" that the conditions prerequisite to use of the "cram-down power" exist in this case.

POINT III

The district court properly exercised its discretion in referring the plan to the Commission for reconsideration in the light of changed conditions.

Having determined that the district court must refer the plan to the Commission for reconsideration when it is not "satisfied" that rejection of the plan has been unreasonable, and that appellate courts cannot substitute their "satisfaction" for that of the district court by reviewing its order—or, at most, will review the district court order only to the limited extent of determining whether the district court's conclusion has any "support in the record"—the next, and final, inquiry must be whether the record is such as to have compelled the district court to find that changed conditions did not justify the order rejecting the plan and returning it to the Commission for reconsideration.

In the first *Denver* case, this Court expressly stated that the district court is not bound by its own previous approval of a plan as fair and equitable. "Reasons to make" a "rejection reasonable may arise thereafter" (328 U. S. 495, 535). The Court does not catalogue such reasons, but mentions "*unanticipated*, large earnings" as an illustration thereof. Taking these words in their context—and considering them in their relation to the entire opinion of the Court—it is apparent that the key word in this quotation is "unanticipated". Presumably, everything "antici-

pated" when the plan was approved is provided for in such plan. Only conditions not then anticipated—either because the facts did not then exist, were not then known, or their significance was not then understood—may be the basis of a reasonable rejection.

Attention should therefore be given not only to events which occurred after June 15, 1945, the date of the approval of the plan, but also to facts and events occurring before such date, if they were not then known, or if known, their significance was not then appreciated or could only be understood in the light of later developments.

In appraising the record before the district court, the narrowness of the field of review, if there is any power of review at all, of the appellate court must be kept in mind. The appellate court must not only find that there was no evidence from which the district court could reasonably reach any conclusion other than that the rejection was unreasonable and not warranted by the change in conditions, but in addition it must find that the evidence demonstrated conclusively such irreparable injury to senior interests from the exercise of the statutory discretion of the district court, without corresponding benefit to others, as compels this Court to find that the District Court abused the plenary discretion vested in it by the statute. It is not sufficient that the appellate court find that it might have reached conclusions different from that reached by the district court. If there is any evidence to support the district court, the appellate court is not justified in reversing.

The record is replete with evidence of important facts and events occurring after June 15, 1945, or then in existence but unknown to the Court, or of a significance not then appreciated—all indicating the equitable necessity of a reconsideration of the plan. There is no direct evidence showing irreparable injury to senior interests from the delay which will necessarily result from a reconsideration of the plan; no direct evidence showing that the rejection of the plan was unreasonable.

New Evidence before District Court:

In all the reports of the Commission and the opinions of the district court at and prior to the approval of the plan, both the Commission and court refused to regard the debtor's stupendous and unanticipated earnings during the war years as a favorable factor in determining the new capitalization of the debtor and the new securities available for distribution to creditors. In fact, the capitalization and outstanding securities were actually reduced from $368,000,000 to less than $330,000,000 as a direct result of these profits. It was stated that these profits were "war profits" which would not continue after the war ended, and that equally abnormal profits were being made by all railroads.

The fallacy of these statements clearly appears from an analysis of the figures, presented to the district court at the hearings on confirmation, of the debtor's earnings subsequent to the termination of the war with Japan (which occurred shortly after approval of the plan on June 15, 1945).

The first four months of 1946 were probably the worst in the history of American railroads: The railroads were charged with an enormous increase in salaries and wages, retroactive to January 1, 1946; no action had then been taken on their applications to the ICC for rate increases; the country's business was stagnant, and the movement of freight fell off considerably (R. 158). During that period the Class 1 railroads as a group—those having annual operating revenues of $1,000,000 or more—failed to earn interest on their outstanding obligations by the sum of $6,800,000. In sharp contrast, the Rock Island during that period, had earnings, after deduction of depreciation and amortization, of over 140 percent of all interest accruing on its total old indebtedness.* After deducting from the earnings of that four month period

---

* See Table A, Appendix, *infra*, p. 29.

all interest accruing on obligations senior to the old Convertible Bonds, the remaining earnings were sufficient to pay the interest on these Convertibles (whose claims are recognized in the plan to the extent of only 17%) more than four and one-quarter times.* After deduction of Federal Income Taxes, depreciation, amortization, and interest on all the old obligations, including the Convertibles, the rate of earnings for the four month period were sufficient to yield the sum of $2,853,000 annually for dividends to the old stockholders, who are completely wiped out by the plan.* The earnings were more than three and one-half times the fixed and contingent interest of $1,594,040 accruing in the same period on all the securities authorized in the rejected plan.

The district court, when it refused to "cram down" the plan, not only had the foregoing facts before it for the first time as to earnings after the end of the war and after approval of the plan, but it was for the first time made aware of other material facts, revealed by the investigation of the railroad situation by the Senate Committee on Interstate and Foreign Commerce in Reports Nos. 925 and 1170, which were issued early in 1946. In Report No. 925, at page 52, the Committee revealed that the Commission had given it data which showed that the Rock Island earned during the pendency of its Section 77 proceeding (to December 31, 1944) sufficient to pay all accruing interest on its old indebtedness and leave $34,000,000 available for cash in the treasury, for reducing its outstanding bonded debt, and for additions and betterments. This surplus was increased to $42,934,096 by the end of April, 1946 (R. 157, 210).

All of the foregoing data, not previously known to the court, as to earnings before, during and after the war (including the first four months of 1946), was presented

---

* See Table A, Appendix, *infra*, p. 29.

to the district court in June, 1946, and caused it to refuse to confirm the plan. Although also presented to the circuit court in the arguments and briefs of the debtor on the appeal, and again on its motion for a reargument, they were ignored by that court in its opinion of reversal.

Since the hearing on confirmation before the district court, the earnings of the Rock Island for the entire year 1946 and the first four months of 1947 have become known.

For the entire year 1946, the debtor's earnings available for the payment of interest were 165% of all interest accruing on the old indebtedness; interest on the old Convertibles was earned 6½ times; the earnings available for the old shares of stock were $4,293,156; and the fixed and contingent interest of $4,782,119 on the new bonds to be issued under the rejected plan was earned 4¼ times. (See Table B, Appendix, *infra*, p. 30.) These 1946 earnings are without the benefit of the increase in freight and passenger rates which became effective January 1, 1947.

During the first four months of this year, 1947, net income available for interest increased still further. During this period, the debtor's earnings available for the payment of interest were 209% of all interest accruing on old indebtedness; interest on the old Convertibles was earned more than 10¾ times; the earnings available for the old shares of stock were at the annual rate of $8,549,853; and the fixed and contingent interest of $1,594,040 on the new bonds to be issued under the rejected plan was earned 5½ times. (See Table C, Appendix, *infra*, p. 31.)

A consideration of the earnings of other railroads shows that the foregoing remarkable record of the Rock Island was made during an abnormally adverse period. If conditions do not improve, giants in the railroad field like the New York Central and Pennsylvania systems are headed for disaster. Yet, during this adverse period the Rock Island earned twice the so-called "normal" earnings of $11,000,000 (242 I. C. C. 298, 437) which were predicted by

the Commission and on which it based the rejected plan. What was anticipated by the Commission has not become actuality; what was unanticipated has indeed become fact.

The foregoing facts, of themselves, do not demonstrate beyond all doubt that the rejected plan is not fair, but it is equally clear that they do not demonstrate that the holders of the old Convertibles acted unreasonably in rejecting the plan and that the district court abused its discretion in refusing to "cram down" the plan and in sending it back to the Commission for further consideration.

Market price of new securities as a test of fairness of plan:

It has been contended in previous hearings on the rejected plan that the holders of the senior bonds are not being paid in full because, in the present depressed market, the value in the "when-issued" market of the securities allotted to them under the plan is less than the face amount of their old claims.

Messrs. Bourne and Bushby, attorneys for senior creditors herein, recently submitted to the House Judiciary Committee a printed table in which they listed the amounts of the claims of the holders of the old senior bonds and the values in the present "when issued" market of the securities allotted to them under the plan, to prove that adequate provision had not been made for them under the rejected plan (the inequities of which they strenuously urge should be perpetuated by confirmation). They did not, however, project their figures to show the ridiculous conclusion to which their figures lead—that the present "when issued" market appraises, upon the same basis, the total value of all the assets of the Rock Island Railroad at $80,000,000, excluding cash and government securities.

On the basis of the Bourne and Bushby figures, the total "when issued" market value of all the securities proposed

in the rejected plan is $164,000,000. If $84,000,000 (the cash and government securities which the Rock Island had on hand on April 28, 1947) are deducted from the over-all figure of $164,000,000, the conclusion is reached that the total value of the Rock Island Railroad, excluding cash and government securities, is approximately $80,000,000. (See Table D, Appendix, *infra*, p. 32.) Obviously, this value is ridiculous. The value of the road is at least five to six times this amount. In October, 1940, the Commission found the reproduction value of the Rock Island, less depreciation, to be $462,911,720 (242 I. C. C. 298, 430), and its value for rate making purposes to be $448,922,450 (242 I. C. C. 298, 430). For the purpose of the plan, at a time when there was little or no cash and no government bonds on hand, the Commission appraised the railroad as having a value of $368,000,000 for reorganization purposes (247 I. C. C. 533, 540).

On the basis of the Bourne and Bushby figures the holders of the Convertibles (the class which rejected the plan) receive only $4,000,000 under the plan in full payment for their claim of $53,605,907—a payment which is less than 50% of the earnings of $9,466,944 available for interest on such bonds for the year 1946 alone.

During 1946, the market value of the Rock Island General Mortgage 4% Bonds of 1988 fell from a high of 106⅛ to a low of 64, a fall of 40%, although its earnings *increased* during this period. The securities allotted under the plan to this class had a corresponding drop in the "when issued" market. Can it be seriously contended that the real value of the Rock Island assets fell 40% during this period?

Must a new plan be formulated whenever there is a rise or fall in the "when issued" market?

Conclusion

This Court in the *Denver* cases sustained the district court in the exercise of its discretion in the use of the "cram down" power; it reversed the circuit court for substituting its own discretion for that of the district court. Petitioner asks this Court to do the same thing here.

Section 77(e) grants a discretionary power, one which by the terms of the statute is permissive and not mandatory. The circuit court more than "proliferated the purpose" of Congress in *requiring* application of the "cram down" power to the Rock Island plan.

Earnings are the kernel of any reorganization. The petitioner herein has a demonstrable consistent earning power of more than double the estimate of the Commission. The district court believed that such unforeseen earning power permitted it to ask the Commission to "check its figures" before destroying millions in investments. The debtor asks no more than this.

Because the circuit court misconstrued the decisions of this Court in the *Denver* cases, misinterpreted Section 77(e) of the Bankruptcy Act, and wrongly decided a question of public importance in the administration of the Bankruptcy Act, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor-Petitioner.

JOHN GERDES,
HENRY F. TENNEY,
Counsel for Debtor-Petitioner.

New York, New York, July 2, 1947.

Appendix.

TABLE A

Earnings of Rock Island

January 1-April 30, 1946

(Figures taken from official reports of Trustees)

Earnings were 40% in excess of interest accruing on all old indebtedness:	
Earnings (after deduction of depreciation, amortization, and federal income taxes, and before deduction of interest accrued but unpaid) (R. 241)	$5,045,897.00
Federal income taxes (added to earnings because taxes are deducted after bond interest has been paid) (R. 241)	633,937.00
Total earnings available for interest on bonds	$5,679,834.00
Interest on all old bonds (R. 241)	4,094,992.00
Excess of earnings over interest requirements on old bonds	$1,584,842.00
Interest on old Convertible Bonds was earned 4¼ times:	
Total earnings available for interest on bonds	$5,679,834.00
Interest on all old bonds senior to old unsecured convertible 4½s	3,610,792.00
Available for interest on old unsecured convertible 4½s	$2,069,042.00
Interest on old unsecured convertible 4½s	$ 484,200.00
Amount earned for stockholders:	
Excess of earnings over interest requirements (from above)	$1,584,842.00
Deduction of federal income tax	633,937.00
Old stockholders' earnings for four months	$ 950,905.00
Annual rate of old stockholders' earnings	$2,852,715.00

TABLE B

Earnings of Rock Island

January 1-December 31, 1946

(Figures taken from official reports of Trustees)

Earnings were 65% in excess of interest accruing on all old indebtedness:

Earnings (after deduction of depreciation, amortization, and federal income taxes, and before deduction of interest accrued but unpaid)	$16,578,161.00
Federal income taxes (added to earnings because taxes are deducted after bond interest has been paid)	3,721,188.00
Total earnings available for interest on bonds	$20,299,349.00
Interest on all old bonds	12,285,005.00
Excess of earnings over interest requirements on old bonds	$ 8,014,344.00

Interest on old Convertible Bonds was earned 6½ times:

Total earnings available for interest on bonds	$20,299,349.00
Interest on all old bonds senior to old unsecured convertible 4½s	10,832,405.00
Available for interest on old unsecured convertible 4½s	$ 9,466,944.00
Interest on old unsecured convertible 4½s	$ 1,452,600.00

Amount earned for stockholders:

Excess of earnings over interest requirements (from above)	$ 8,014,344.00
Deduction of federal income tax	3,721,188.00
Amount available for dividends	$ 4,293,156.00

TABLE C

Earnings of Rock Island

January 1-April 30, 1947

(Figures taken from official reports of Trustees)

Earnings were 109% in excess of interest accruing on all old indebtedness:	
Earnings (after deduction of depreciation, amortization, and federal income taxes, and before deduction of interest accrued but unpaid)	$6,944,943.00
Federal income taxes (added to earnings because taxes are deducted after bond interest has been paid)	1,900,000.00
Total earnings available for interest on bonds	$8,844,943.00
Interest on all old bonds	4,094,992.00
Excess of earnings over interest requirements on old bonds	$4,749,951.00
Interest on old Convertible Bonds was earned 10¾ times:	
Total earnings available for interest on bonds	$8,844,943.00
Interest on all old bonds senior to old unsecured convertible 4½s	3,610,792.00
Available for interest on old unsecured convertible 4½s	$5,234,151.00
Interest on old unsecured convertible 4½s	$ 484,200.00
Amount earned for stockholders:	
Excess of earnings over interest requirements (from above)	$4,749,951.00
Deduction of federal income tax	1,900,000.00
Old stockholders' earnings for four months	$2,849,951.00
Annual rate of old stockholders' earnings	$8,549,853.00

TABLE D

Securities Allotted Under Rock Island Plan to Bondholders

Issue	Principal Amount	Amount of Claim, for $1000 bond; May 1, 1947	Market Price, per $1000 bond, of Allotment of "When Issued" Securities May 6, 1947	Percentage of Claim Satisfied by Allotment	Value of Total Claims on Basis of Present Market Prices
Equipment	$ 10,000,000	....	...	..	$ 10,000,000
C. & M.	3,524,000	....	...	..	3,524,000
Gen. Mtge.	61,581,000	$1,344	$829	62	51,000,000
First & Ref. Mtge.	104,470,000	1,452	521	36	54,000,000
Sec. 4½%	39,813,600	1,511	586	39	23,330,000
C. O. & G.	5,411,000	1,525	809	53	4,400,000
St. P. & K. C. S. L.	9,983,750	1,553	441	28	4,400,000
R. I. A. L.	11,000,000	1,519	561	37	6,170,000
B. C. R. & N.	11,000,000	1,648	349	21	3,839,000
L. R. & H. S. W.	453,600	509	330	65	150,000
Unsec. Con. 4½s	32,228,000	1,617	124.18	7.7	4,002,000
Gen'l Creditors	500,000	....	...	..	62,000
			Total		$164,877,000
			Less cash and gov't securities on hand		84,000,000
			Value of Rock Island on basis of market prices		$ 80,877,000

§ 24. *Jurisdiction of appellate courts.* * * * (c) The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

§ 77. *Reorganization of railroads engaged in interstate commerce.* * * * (e) *Court hearing after approval by Commission; acceptance of plan by creditors and stockholders; confirmation of plan by court; valuation of property.* Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring

the debtor's assets, for expenses and fees incident to the reorganizations, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the

judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided, further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is

required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided, further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his

conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 184-9

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY, COMPANY,
Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY, COMPANY,
Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, *et al.*, as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, *et al.*, JOHN C. TRAPHAGEN, *et al.*, JAMES G. BLAINE, *et al.*,

Respondents.

REPLY BRIEF OF DEBTOR-PETITIONER

JOHN GERDES,
One Wall Street,
New York, New York.

HENRY F. TENNEY,
120 South LaSalle Street,
Chicago, Illinois.

Counsel for Debtor-Petitioner.

New York, New York, September 11, 1947.

INDEX

CITATIONS

Cases:

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 184-9

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY, COMPANY,

Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY, COMPANY,

Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, *et al.*, as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, *et al.*, JOHN C. TRAPHAGEN, *et al.*, JAMES G. BLAINE, *et al.*,

Respondents.

REPLY BRIEF OF DEBTOR-PETITIONER

The debtor believes it necessary to reply briefly to some of the assertions and arguments in Respondents' Brief.

1. *Applicability of the Denver opinion of this Court,* 328 U. S. 495.

Events occurring since the filing of debtor's petition herein bring into sharper focus the fact that the question before this Court is:

May the District Court, or the District Court and Commission* acting together, reconsider the fairness of a plan when the following facts appear: (1) the plan had previously been approved by the Court and Commission; (2) the plan had thereafter been rejected by adverse votes in excess of 75% by two important classes of creditors; and (3) the District Court has found that the rejections were reasonably justified by a large and unanticipated increase in the earnings of the debtor *after the plan had been approved?*

The Circuit Court of Appeals held, and respondents contend, that increased earnings after approval of the plan, no matter how great, must be conclusively considered as having been anticipated by the Court and Commission when they approved the plan (even though the Court later asserts that it did not anticipate such earnings, and the Commission is prevented from stating its views). This Court's *Denver* decision, 328 U. S. 495, is relied upon as establishing this principle.

Petitioner contends that in the *Denver* case no argument was made that facts occurring *after* approval of the plan required its consideration but reliance for reconsideration was placed entirely upon facts which occurred *prior* to approval of the plan, as to which this Court held the order of approval was *res judicata.* In that case the power of the District Court to direct a reconsideration of the plan, after approval, because of subsequent unanticipated earnings, was expressly recognized (328 U. S. 495, 535):

---

* In this case the Commission did not express its views as to the desirability of reconsideration of the plan. It held that it was powerless to do so while the appellate courts were in process of reviewing the order of the District Court refusing confirmation of the plan and referring it to the Commission for further consideration. In practical effect, therefore, action such as that followed by these respondents effectively blocks a reconsideration of the plan even when both Court and Commission deem such action desirable in the light of changed conditions.

"Reasons to make [creditors'] rejection reasonable may arise [after approval]. For example, unanticipated, large earnings might develop."

2. *The debtor's earnings throughout the post war period demonstrate a consistent earning power of more than double the Commission's estimate: this is the prime type of unforeseen circumstance of which this Court spoke in the first Denver case,* 328 U. S. 495, 535.

The so-called "normal" earnings of the Rock Island which would be available for the payment of interest on indebtedness were predicted by the Commission to be $11,000,000 (242 I. C. C. 298, 437). On this prediction the rejected plan was based. Yet the debtor's earnings have consistently been *more than twice* this figure.

Analyses of the earnings data available when the debtor's petition for certiorari was filed are stated therein (pp. 21-6, 29-31). The Trustees' figures for the first seven months of 1947 are now available:

EARNINGS OF ROCK ISLAND
January 1-July 31, 1947

Earnings (after deduction of depreciation, amortization, and federal income taxes, and before deduction of interest, accrued but unpaid on all outstanding bonds)	$12,008,706.
Federal income taxes (added to earnings because taxes are deducted after bond interest has been paid)	2,968,000.
Total earnings available for interest on old bonds	$14,976,706.
Interest on all old bonds	7,166,273.
Excess of earnings during the first seven months of 1947 over interest requirements on all the old bonds	$ 7,810,433.

Interest on all the old convertible bonds was earned more than ten times during this period,* as shown by the following figures:

Total earnings available for interest on all outstanding bonds (from foregoing table)	$14,976,706.
Interest on outstanding bonds which are senior to the convertibles	6,318,900.
Earnings available for interest on convertibles	$ 8,657,806.
Interest accruing on the convertibles	$ 847,350.

These figures—of earnings during one of the worst periods in the history of our railroads—are of vital importance to all who have invested in the Rock Island; they show that the I. C. C. was grossly mistaken in its prediction of earnings for the railroad; they put meaning into the overwhelming rejection by two creditor classes of the reorganization plan; they justify Judge IGOE's refusal of confirmation and remission of the plan to the Commission for a reexamination, not necessarily a change, of its work.

Respondents in their brief assert as a main thesis that no unexpected change or condition exists within the meaning of the first *Denver* case, 328 U. S. 495, 535. If continuous earnings of more than twice the estimate of I. C. C. are not an unanticipateed circumstance making a plan's rejection reasonable, what is?

---

* The holders of which are paid only 17% of their claims for principal and interest under the plan. They rejected the plan by an adverse vote of over 75%.

3. *The attitude of the Congress and of the Interstate Commerce Commission is that pending railroad reorganization plans are unfair, and under Section 77 unfairness can be removed.*

Throughout respondents' brief the opinion of the District Court (R. 249-53) refusing confirmation of the rejected plan is belittled for referring to the unrest of Congress and the I. C. C. with respect to present "forfeiture plans" under Section 77 and the possibility of a new reorganization law. The purpose of Judge IGOE's reference was not speculatively to look to possible legislation and to decide the *Rock Island* case by what the law might be in the future. Instead, he quoted Congressmen and the Commissioners to show the unfairness of the rejected plan under present law—under Section 77—and wholly in accordance with that law he refused confirmation. It is obvious that the courts cannot wait for possible legislative changes in reorganization proceedings any more than in other types of cases. This Judge IGOE did not do nor purport to do. Section 77 and the demonstrable unfairness of the rejected plan governed his decision.

The lack of satisfaction with pending railroad reorganization plans has continued, and increased. The Senate Committee on Interstate and Foreign Commerce and the House Committee on the Judiciary during the first session of the Eightieth Congress both commented on the inequities of the *Rock Island* plan in view of that railroad's unanticipated capacity for earnings. An important statement issued by our Congressional leaders on this subject as recently as August 1, 1947, is fully reproduced in Appendix A to this brief, *infra*, pp. 11-15.

The nature of the new legislation which is proposed is not now important; this case must be decided under Section 77. What is important is that conditions in the *Rock Island* and some of the other reorganizations are suffi-

ciently inequitable to cause the Congress, busy with problems of world importance, to consider reorganization legislation. When railroad reorganizations are criticized by the Congress and public to such an extent, it is patently justifiable to use machinery expressly created by Section 77(e) for exactly this situation:

> "If the judge shall not confirm the plan, he shall * * * in his discretion * * * refer the case back to the Commission for further proceedings."

The outstanding development in this line is that the Interstate Commerce Commission, recognizing the change of economic conditions since approval of the reorgnization plan for the Missouri Pacific system, requested the district court to remit the plan to it for further consideration.** This action in indicating the Commission's attitude toward present plans is so important to the present case that the I. C. C.'s memorandum requesting remand is reproduced in full in Appendix B to this brief, *infra*, pp. 16-23.

In its memorandum brief on remand of the Missouri Pacific plan, the Commission develops two reasons which it states are adequate to justify remitting the plan for reconsideration:

> (1) extensive expenditures made for improvement of the property may affect the earning power of the pany; and

---

**It is to be noted that the Commission says (*infra*, p. 17) it has "consistently refrained from volunteering its views on new or changed conditions", believing that any request for its views on reexamination of plans must come from the courts. In the *Missouri Pacific* reorganization the district court approved the plan, and it was not until the circuit court specifically sought the I. C. C.'s attitude that any was expressed. In this *Rock Island* case the Commission, in deference to the appellate court postponed its already scheduled hearings on a reconsideration of the plan and gave no expression to its views.

(2) debt retirement, cash accumulations, and interest payment make adjustments necessary in the distribution of cash and new securities, which "may result in substantial disturbance of the balanced relationship of the treatment provided for the various classes of creditors."

Both these conditions are equally present in the Rock Island reorganization. In addition to these factors is the primarily controlling fact, not mentioned by the Commission in its *Missouri Pacific* brief, that the Rock Island railroad has a well demonstrated earning power which is in excess of twice that predicted by the Commission.

Word has just been received that the Circuit Court of Appeals for the Eighth Circuit has given effect to the Commission's request, and, reversing the order of the District Court, has referred the plan back to the Commission for reconsideration.

4. *The debtor has standing to apply for certiorari, since Section 77 in explicit terms affords that right and every court considering the question has so held.*

Without joining direct issue on the problem, respondents seek indirectly to discredit the debtor's position regarding the main questions in these cases by attacking its status to apply for certiorari (Resp. Brief, pp. 2, 48-50). The same contention was made by respondents before the Circuit Court of Appeals, the District Court, and the Commission, and each time was rejected.

Section 77(c)(13) provides that "the debtor • • • shall have the right to be heard on *all* questions arising in the proceeding." (Emphasis supplied.) Similar language in Section 206 of Chapter X has been held to grant the right to appeal. In re *Keystone Realty Holding Co.*, 117 F. 2d 1003, 1005 (C. C. A. 3d 1941); *Dana* v. *SEC*, 125 F. 2d 542, 543 (C. C. A. 2d 1942).

The debtor makes no contention that it may speak for creditors or stockholders individually. It does contend, however, that it represents the estate as a whole and that its right and duty is to present to the Commission and the courts the respects in which the Rock Island plan of reorganization fails to conform with proper legal and equitable standards. In doing this, the debtor is acting for the benefit of all creditors, secured and unsecured, and all stockholders, preferred and common, who are injured by the fact that the plan is not fair and equitable, except those who act directly in their own behalf, and those who have expressly delegated to committees or other representatives the power to act for them.

Recent cases in this Court clearly recognize the debtor's right to appeal on behalf of the entire estate from approval of a Section 77 reorganization plan even in the face of a finding below that no equity remains in the debtor's property for stockholders. In *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943) the outstanding stock was found to be valueless by the Commission and District Court, but the debtor was permitted, on a rehearing (p. 140), to appeal to the Circuit Court of Appeals, 124 F. 2d 136, 140 (C. C. A. 9th 1942), was granted certiorari by this Court, 316 U. S. 654 (1942), and argued on the merits of the appeal, 318 U. S. 448 (1943). As shown by the summary of the debtor's argument in that casee (87 L. ed. 907-909), it argued primarily for junior creditors.

In *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul, and Pacific R. Co.*, 318 U. S. 523 (1943), the debtor took an appeal from the order approving the plan and was heard in the Circuit Court of Appeals, 124 F. 2d 754 (C. C. A. 7th 1942). Later the debtor briefed and argued as an appellee to this Court, 318 U. S. 523 (1943).

Similarly, in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R. Co.*, 328 U. S. 495 (1946),

the debtor, taking appeals from the orders of approval and confirmation, was heard in the Circuit Court of Appeals, 150 F. 2d 28 (C. C. A. 10th 1945), and on certiorari argued the case to the Supreme Court, 328 U. S. 495, 502, 505 (1946). It appears in the opinion of the Court that the Denver & Rio Grande stock had been held valueless, but nevertheless the debtor was permitted without challenge to argue on behalf of creditors.

In the second appearance of the *Denver* case before this Court recognition of the debtor's right to seek review of orders in reorganization was expressly given. Reference was made in the opinion to "the creditors and stockholders whom the debtor represents here * * *." *Insurance Group Committee* v. *Denver & Rio Grande Western Railroad Co.*, 329 U. S. 607, 618 (1947).

All courts dealing with this issue have given recognition to a debtor's right to seek review of the reorganization plan on behalf of creditors as well as stockholders.

A proceeding under Section 77 is not an adversary controversy but an equitable proceeding in which not only the debtor, but the Commission and the courts as well, are charged with the duty of seeing that an equitable distribution of the assets of the debtor is made among its creditors and stockholders. Inequities to classes of creditors, whether secured or unsecured, cannot be tolerated merely because some so-called representative committee has agreed to such inequities. Certainly, no court will ignore inequities in a plan merely because the debtor, rather than a creditors' or stockholders' committee, has called attention to them.

Conclusion

Reorganization proceedings are essentially in equity. Legalisms should be disregarded in favor of the real interests of the parties.

The senior creditors are fully protected by the absolute priority rule. Mortgages must be fully satisfied to the extent of mortgaged assets before general creditors may participate in any excess, and all creditors share equally in unmortgaged assets. Since senior creditors possess this priority which must, in any event, be recognized, it is not unfair to request a reexamination of the plan before millions of dollars in junior investments are destroyed.

All that the debtor seeks is that the Commission be allowed to "check its figures" according to the procedure prescribed in Section 77 before the rejected plan is consummated.

The prayer of the debtor is respectfully renewed that its petition for writ of certiorari in this equitable cause be granted.

JOHN GERDES,
One Wall Street,
New York, New York.

HENRY F. TENNEY,
120 South LaSalle Street,
Chicago, Illinois.

Counsel for Debtor-Petitioner.

New York, New York, September 11, 1947.

Appendix A

Statement on Pending Railroad Reorganization Legislation.

In view of the widespread interest, both in Congress and throughout the country, in pending legislation to prevent further unnecessary and unwarranted forfeiture or impairment of over two billion dollars par value of investments in railroads now in recognition, a statement of the present status of this legislation appears timely.

That such legislation was not enacted into law during the session of Congress just ended is regretable. That it failed of enactment during the recent session was due partly to the time required for its careful preparation before it was introduced. Similar legislation (S. 1253) was passed in the second session of the 79th Congress by a vote of 2½ to 1 in the House and without a dissenting vote in the Senate. While that measure was pocket-vetoed by the President, his Memorandum of Disapproval clearly disclosed that he favored the objectives sought and approved the broad principles upon which that measure was based. He expressed his belief that the 80th Congress could pass an improved billl which would meet his stated objections and more effectively accomplish its purposes.

In a joint statement issued April 28th of this year, we said:

> "On February 3, 1947, Senator Reed, acting for Senator Myers of Pennsylvania, and Representatives Hobbs and Reed had a most agreeable conference with President Truman. It was agreed that the President would instruct his assistants to confer with the Members of Congress and lend any aid they desired in preparing new legislation which would meet the objections that the President had directed at the previous bill. The bill introduced today by Representative Reed (of

Illinois) (H. R. 3237) is the result of several months intensive study by the proponents on both Houses of Congress and their assistants and of the legislative assistants of the President. Senators Reed and Myers will offer amendments to Senate Bill 249 which will revise that bill in a manner to make it substantially identical with the bill introduced by Representative Reed of Illinois."

The objections of the President to S. 1253 were appropriately met in the new bill (H. R. 3237) introduced April 28th.

That measure was promptly set down for hearing before the Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary, and extensive hearings were held on May 12, 13, 14, 15, 16 and 19. (The printed record of such hearings comprises 307 pages.)

On May 8th Senators Reed and Myers issued a Subcommittee print of their proposed amendments to S. 249 which would make that bill substantiallly the same as H. R. 3237. Hearings on S. 249 and those amendments were commenced on the very day hearings on H. R. 3237 were concluded (May 19th), and continued on May 21, 23, 27, 28 and 29, and June 4, 5 and 6. (The printed record of those hearings comprises 596 pages.)

On June 25th, the Subcommittee of the House Committee on the Judiciary, favorably reported a "clean bill" (H. R. 3980).

On July 3rd the Senate Committee on Interstate and Foreign Commerce favorably reported S. 249 with amendments that made that bill substantially identical with H. R. 3980.

On July 15th, after considering H. R. 3980 at several executive sessions, the Committee on the Judiciary reported

the bill favorably. An application for a rule was then made to the Rules Committee. Hearings thereon were held by that Committee on July 18th and 21st. On the latter date (but five days prior to the scheduled adjournment of the session) the Rules Committee voted not to grant a rule at that session. A reconsideration of this vote on July 25th was blocked on a point of order, on the ground that the Committee had theretofore agreed not to vote out a rule at that session.

As with many other bills before Congress in the recent session, the pressure of pending appropriation bills and other urgent legislation made it impossiblee to obtain a vote on these railroad measures during the closing days of the session. That this legislation will be promptly considered when Congress reconvenes is regarded as certain.

Particularly in view of the fact that Governmental agencies themselves are largely responsible for the drastic character of pending reorganizations, which led to extensive litigation and delay, we are confident that the Congress will favorably consider these remedial measures. They are intended to remedy policies initially put into effect by one of Congress' own agencies, the Interstate Commerce Commission. In general, the courts have declined to give full judicial review to the plans and policies of the Commission, stating that only Congress can so direct or otherwise grant relief. We believe Congress will act again upon this suggestion, as it did last year in the passage of S. 1253.

While the desirability of concluding pending reorganizations and returning the properties to private management is fully recognized, it is of vastly greater public importance that justice be done and that investments in our railroads be not needlessly destroyed or seriously impaired merely for haste.

In fact, haste at this juncture will cause a great deal indeed to be uselessly sacrificed. The properties of the various railroads are being operated with reasonable efficiency, although not with all the esprit de corps of private management. But the public interest in any event is being fully protected as to service.

Where the public interest is *not* being protected is in the attempted consummation of reorganization plans which wipe out, unnecessarily and unjustly, wide segments of capital, and disrupt others. The result is that a great deal of potential capital which might be devoted to public use in our railroad systems is being scared away. This is one of the great hidden sacrifices inherent in these plans, and one of the compelling reasons in the public interest why these plans should be arrested. Delay of this kind is constructive, desirable and will promote the public welfare.

It is a matter of common knowledge, demonstrated by the evidence produced at the hearings before Committees of both Houses, that the principal railroads affected by these bills are doing as well in many respects, and better in some, than a great many other railroads. The obvious injustice and inequity of rushing the innocent security-holders of these railroads "to the guillotine", so to speak, before Congress has an opportunity (in a few months) of passing on measures to review and correct the policies under which those holders were "condemned" by Governmental fiat, will surely be recognized.

The enactment of this legislation will not cast aside the work done thus far in those reorganizations, but rather will enable a fair and equitable capital structure to be built upon the foundation of the records already made in those proceedings, supplemented by unassailable proof of the subsequent vast improvement in the financial affairs and demonstrated earning power of those carriers.

Appendix A

It is most earnestly hoped by the sponsors of this legislation in both Houses of Congress that the courts of the United States and the Interstate Commerce Commission will take no further steps toward the effectuation or consummation of pending plans or reorganization that may place such plans beyond the reach of Congressional remedy, but will instead cooperate with the Congress and the President in retaining custody of such properties until this pending legislation can be considered and voted on shortly after Congress reconvenes.

CLYDE M. REED,
FRANCIS J. MYERS,
SAM HOBBS,
CHAUNCEY W. REED.

Washington, D. C.
August 1, 1947

Appendix B

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE EIGHTH CIRCUIT.

Nos. 13367, 13368, 13369, 13371, 13372, 13373—Civil

IN THE MATTER OF MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR

EDMUND WRIGHT, ETC., ET AL.

v.

GROUP OF INSTITUTIONAL INVESTORS, ETC., ET AL. (CONSOLIDATED APPEALS)

MEMORANDUM BRIEF FOR INTERSTATE COMMERCE COMMISSION

This memorandum brief is in response to this Court's request, incorporated in its order of May 24, 1947, that the Interstate Commerce Commission, if so advised, file brief stating its views respecting the issues raised by the appeals.

The Commission has given consideration to the briefs filed by appellants in the light of the record. The Commission by recorded action has decided to recommend to the Court that the Reorganization Plan of the Missouri Pacific as certified by the Commission and approved by the District Court be referred back to it for further hear-

ing and consideration and such revision as it may find to be appropriate.

The reasons which have prompted the Commission to this action follow:

The chief issue raised by the appeals is whether the conditions of the bankrupt's property have so changed since the closing of the record before the Commission and the certification of the plan to the District Court as to make it necessary or desirable to have further Commission consideration.

Subsection (d) of Section 77 provides that if the Commission approves a plan it shall thereupon certify the plan to the Court together with a transcript of the proceedings before it and a copy of the report and order approving the plan, thus fulfilling its administrative function. Thereafter all formal proceedings are before the courts: the views of the parties, their interpretation of any new data and their effect upon the reorganization requirements must be submitted to the courts. The Commission has consistently refrained from volunteering its views on new or changed conditions. At such point in the proceedings it has felt that the question whether conditions have so changed as to require resubmission of the plan to the Commission for revision is primarily one for the District Court before which the facts may be presented and the matter argued. If the court upon review of the conditions existing at the time the plan is before it concludes that changed conditions or other circumstances are such that a review and modification of the plan seems necessary or desirable it may refer the plan back to the Commission. That this is the prescribed statutory procedure is shown by subsection (e) which provides that the district judge may "in his discretion and on motion of any party in interest refer the proceedings back to the Com-

mission for further action, in which event he shall transmit to the Commission a copy of any evidence received.'"[1]

In the instant case the Commission's third supplemental report and order of October 9, 1944, finally approved (after petitions for modification had been filed) the plan of reorganization now pending in this Court (R. 783). In that report the Commission discussed the effect upon the plan of a payment by order of the bankruptcy court of 30 percent of the principal amount of St. Louis, Iron Mountain & Southern (River & Gulf Divisions) first mortgage bonds amounting to $10,352,400 of principal of the bonds. While this payment had not been contemplated at the time of the issuance of its report of July 4, 1944, it was a basis urged subsequently for modification of the plan, and considered in the report of October 9, 1944. In that report the Commission stated that such payment and others should be left to the discretion of the court. Although such payment would result in the non-issuance of $10,352,400 of new collateral trust 3½ percent 10-year notes provided for issue under the plan in satisfaction of this part of these bondholders' claims, as well as $12,940,000 of new series C first mortgage bonds which would be pledged as security for the notes, the Commission stated that it had fixed $560,000,000 as a *maximum* permissible capitalization of the reorganized debtor and that it recognized that distribution of cash by order of the District Court within the framework of the plan might result in a somewhat less capitaliza-

---

[1] Compare *Chicago & N. W. Ry. Co.* v. *U. S.*, 52 F. Supp. 65, affirmed *per curiam* 320 U. S. 718. There the Commission denied a motion to reopen the reorganization after confirmation of the plan on grounds of changed conditions. An attempt was made to review this order under the Urgent Deficiencies Act, 28 U. S. C. A., sec. 41 (28), 46, 47. In denying jurisdiction the statutory court held that review of Commission orders in bankruptcy proceedings are limited to the district court sitting in bankruptcy.

tion at the time of consummation (R. 787). The Commission considered that the new securities so released by the payment on this claim should not be distributed to other creditors. This cash payment has been directed by the District Court.

However, since the issuance by the Commission of its last report and order the District Court has authorized other cash payments on the principal of certain obligations of the debtor. The present effect upon the reorganization plan as approved by the Commission may be tabulated thus:

	Amount of claim paid	New securities which would be released if obligations purchased or satisfied are canceled
R. F. C. claim.	$23,134,080	$23,134,800 new first mortgage bonds.
Bank debt	5,850,000	5,850,000 new first mortgage bonds.
R. C. C. claim.	2,487,000	2,487,000 new first mortgage bonds.
River & Gulf bonds	[1] 13,803,200	[1] 13,803,200 new first mortgage bonds (approx.) new class.
Secured serial 5½ percent bonds	895,000	756,725 A common stock. 504,417 (approx.) new class B common stock.
Boonville, St. L. & Sou. bonds	210,500	57,580 (approx.) new first mortgage bonds. 57,580 (approx.) new preferred stock.
	46,380,500	$46,651,302

Under the District Court's orders the bonds acquired through the satisfaction of the River & Gulf mortgage have been cancelled. In all other instances the obligations

[1] Amount shown does not include interest on the bonds. Interest has been paid currently on these bonds.

purchased are held by the trustees of the debtors for the benefit of the holders of Missouri Pacific first and refunding bonds and for the benefit of any other creditors of the debtor to the extent of their respective interests, if any, in the cash used in the purchase of the obligations as the same may appear or may hereafter be determined by the Court or any Reorganization Plan, with right of subrogation (R. 1179). The Court reserved the right to order the obligations purchased to be cancelled should it find such to be in the best interest of the trust estate.

In addition to the above payments of principal and interest on claims, the District Court has, from time to time, ordered payments in large amounts of accrued delinquent interest on the most senior bond issues of the three principal debtors. The plan, however, makes specific provision for these payments. They alone present no reason for further consideration of the plan by the Commission.

Extensive expenditures have been made for improvement of the property. The effect of those upon the earning power of the company may be controversial. Operation of the properties in recent years has resulted in large accumulations of cash in the treasuries of the companies. Some of this cash may be available for distribution to the security holders. While the plan is sufficiently elastic to permit of adjustment for a reasonable amount of debt retirement and interest payment, it is questionable whether the possibility of the large retirements and expenditures and further cash accumulations which have occurred were contemplated. Whether the provisions of the plan should be interpreted as permitting the acquisition of claims for the benefit of other classes of creditors may be doubted.

Adjustment of the plan to meet present conditions involves several major problems. The first is: Should the

securities released through retirement and acquisition of claims be redistributed to other creditors or cancelled? Since the plan may not have contemplated such large retirements, the total permissible capitalization as found by the Commission may be affected.[3] This situation is aggravated by the possibility of further cash distributions.

If it be decided that the released securities should be distributed to the remaining security holders there is involved the determining of their rights in and to the cash used for retiring and acquiring other claims. The exchange of securities and the apportionment of cash under the plan are in accordance with a somewhat involved formula based upon the value of the constituent debtors to the new system, chiefly by reason of their past, present and prospective earnings and, to a certain extent, in the case of a few of the debtors, the strategic importance of their lines of railroad. The formula, however, is not a rigid one, and, in some degree, the allocation of securities and possibly cash, is the result of trading between representatives of the various debtors who participated in the negotiation of the so-called "compromise plan," which, with some changes, was adopted by the Commission. The allocation of cash among the present security holders is in general on the basis of the cash on hand (as of that time) in the treasuries of the three principal debtors.

The working out of a fair and equitable adjustment of the distribution of cash and securities will be a complicated matter. To attempt to do this within the framework of the present plan may result in substantial disturbance of

---

[3] The judgment of the Commission on total permissible capitalization is final. *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 474; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S 523, 541.

the balanced relationship of the treatment provided for the various classes of creditors.

It is submitted that these problems arising out of the substantial changes in conditions since the approval of the plan justify its further review by the Commission.

There are additional reasons which make it desirable that the Commission give further consideration to the plan. Opportunity will be afforded for reviewing the so-called "cash-option" provisions and determining whether they are practicable under present conditions of the security market. Under the present plan it is necessary for the reorganization managers to purchase new general mortgage bonds and new common stock at certain maximum prices. In this connection there is some question whether both the new class A and class B common stock may be so purchased and as to whether purchases of the new general mortgage bonds and common stock must under the provisions of the plan be made by the reorganization managers immediately at the time of the consummation of the plan or whether they may be purchased as market conditions may permit over a considerable period after consummation of the plan. The terms of the approved plan are not explicit upon these questions.

Again, if the plan be returned to the Commission opportunity will be had of reviewing its provisions as to the selection of the reorganization managers and the first board of directors of the new company. The holdings of present securities of some of the parties entitled under the plan to nominate appointees probably have materially decreased from their original holdings, notably in the case of the Institutional Group of Holders of Missouri Pacific First and Refunding Bonds. In the case of the Reconstruc-

tion Finance Corporation, whose loan has been satisfied, there will be an initial failure of appointment.

For these reasons the Commission is of the opinion that the present plan should be returned to it for reconsideration and revision, and it so recommends.

Respectfully submitted.

DANIEL W. KNOWLTON,
Chief Counsel,

DANIEL H. KUNKEL,
Attorney,
Washington, D. C.

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 184-9

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY, COMPANY,
Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY, COMPANY,
Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, *et al.*, as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, *et al.*, JOHN C. TRAPHAGEN, *et al.*, JAMES G. BLAINE, *et al.*,
Respondents.

ANSWER TO RESPONDENTS' "MEMORANDUM"

JOHN GERDES,
One Wall Street,
New York, New York.

HENRY F. TENNEY,
120 South LaSalle Street,
Chicago, Illinois.

Counsel for Debtor-Petitioner.

New York, New York, September 29, 1947.

INDEX

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 184-9

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY, COMPANY,
Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY, COMPANY,
Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, *et al.*, as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, *et al.*, JOHN C. TRAPHAGEN, *et al.*, JAMES G. BLAINE, *et al.*,
Respondents.

Answer to Respondents' "Memorandum"

The debtor-petitioner regrets that it is necessary to ask this Court to consider this additional brief because of the unfounded statements and allegations in Respondents' recent Memorandum.

1. In Respondents' Memorandum (pp. 14-5) it is stated, for the first time, that the Commission in formulating the Rock Island plan did not estimate the normal annual income available for interest to be $11,000,000, but instead used that figure only in determining the amount of new income bonds to be issued in the reorganization.

The ICC was explicit upon this point; no cavil is possible. In the Commission's opinion of October 31, 1940 (242 ICC 298, 437) it said:

> "Despite such savings, the evidence of record convinces us that the estimate by the first and refunding committee of $12,500,000 of earnings available for interest in a normal year is somewhat too high. However, *earnings available for interest and dividends of approximately $11,000,000 in a prospective normal year are reasonably well supported by the evidence of record,* and particularly by the analytical traffic study presented by the first and refunding committee and the estimates of revenues and expenses based on such study." (Emphasis supplied.)

Moreover, the ICC this week submitted to the Senate Committee on Interstate and Foreign Commerce selected fiscal data relating to the Rock Island Railroad, and among these data is the item: "Normal year * * * Income available for interest * * * As adopted by ICC * * * $11,000,000."

The Report of the Trustees for 1945 filed with the district court on August 6, 1946, shows (p. 5737) the following interest requirements—contingent and fixed—under the plan now before this Court:

Interest on Equipment Obligations	$ 156,677.
Interest on First Mortgage Bonds	1,073,847.
Interest on assumed C. & M. Bonds	137,950.
Contingent interest on General Mortgage Income Bonds	3,330,322.
Total interest requirements under plan	$4,698,796.*

* This figure differs from the total interest requirements of $5,334,976 tabulated by the Commission (257 I. C. C. 319) because of a subsequent diminution in the securities to be issued under the plan, due to debt retirement.

If there is added to the foregoing interest requirements such sinking fund payments on both fixed and contingent interest bonds, compulsory capital fund payments under the plan, and dividends in full on the preferred stock, as are required under the plan, the following results are obtained:

Capital fund payment (257 I. C. C. 319)	$ 1,614,038.*
First Mortgage Sinking Fund (257 I. C. C. 319)	200,000.*
Income Bond Sinking Fund (257 I. C. C. 319)	400,000.*
Full dividend on 5% Preferred Stock (Trustees' Report for 1946, page 5737)	3,526,537.*
Total	$ 5,740,575.
Plus fixed and contingent interest	4,698,796.
Total amount required for fixed contingent interest, dividends on preferred stock, and other charges	$10,439,371.

As demonstrated by the foregoing figures, the Commission in its allocation of preferred stock clearly erred in basing such allocation upon possible earnings of approximately $17,000,000, since its own estimate of $11,000,000 of earnings "in a prospective normal year" "available for interest and dividends" were sufficient to cover all preferred stock requirements. This error, committed by the Commission *prior* to *approval* of the plan, cannot be used by debtor-petitioner as a basis for reversal on this appeal; but, clearly, respondents cannot justify an error by reliance on another error.

---

* These capital fund and sinking fund requirements are based on the initial proposed issue of securities under the plan; a revision to reflect subsequent debt retirement would reduce these figures. The preferred dividend requirements include reductions due to debt retirement.

The record is clear: the Commission found that "earnings available for interest *and dividends* of approximately $11,000,000 in a prospective normal year are reasonably well supported by the evidence of record". Earnings of more than twice this amount in poor railroad years call for a reexamination of the situation.

2. The fact that earnings during the war years exceeded the post war earnings (Respondents' Memorandum, p. 13) is immaterial, since no effect was given to war earnings in the formulation of the plan. The important fact is that the post war earnings, during a period of depression in the railroad field, are more than two and one-half times the earnings on which the plan was predicated.

3. The figures (Respondents' Memorandum, p. 13) of the debtor's "earnings before interest" are incorrect because taxes are deducted before arriving at the figures given. Since taxes are deducted *after* payment of interest, "earnings available for interest" customarily are earnings before deduction of interest or taxes. On this basis, the earnings of the debtor available for interest were $58,137,708 in 1943, $59,915,919 in 1944, $39,088,810 in 1945, and $20,299,349 in 1946. Respondents understate the earnings of the debtor available for interest during this four year period by the enormous sum of $76,965,427.

4. The argument (Respondents' Memorandum, p. 13) that there should be no readjustment of the plan to benefit the unsecured claims of the holders of the convertible bonds because, under the plan, there is a $106,000,000 deficit in the recognition of some classes of secured claims, is clearly fallacious, for the following reasons:

(a) The argument assumes that secured creditors are entitled to full priority over unsecured creditors regardless of the value of their security, whereas the law is that such priority is limited to the value of their security. There is

nothing in the record to show that the value of the security of these classes of secured creditors is in excess of their claims; on the contrary, failure to pay them in full under the plan must have been predicated upon a finding that their security had a value less than the amounts of their claims.

(b) The argument disregards the large amount of cash and its equivalent which is now in the treasury of the debtor, of which $70,000,000 has been found by the District Court to be available for debt retirement. This was not available when the plan was formulated.

(c) The argument does not take into consideration that earnings at the annual rate of $27,757,056, available for interest, in a *sub*-normal period, instead of earnings of $11,000,000 estimated for a normal period, justify an increase in capital more than sufficient to make up the deficit. (The Commission authorized a capitalization of $368,000,000 on estimated earnings of $11,000,000.)

(d) The argument assumes that it is not the duty of this Court, the Commission and the debtor, despite the acquiescence of the so-called representative committees of these classes of secured indebtedness, to protect such classes by securing their payment in full under the plan, if they are entitled to such payment.

(e) The argument ignores the many millions of dollars invested during the pendency of the proceeding by capital improvements upon the properties upon which these secured creditors have their liens.

5. Respondents state (Respondents' memorandum, p. 18): "The Debtor, consistently with the position it has taken for many years, seeks further delay in carrying through this plan". The old cry: We have possession now; do not disturb, or even delay, our enjoyment of that possession by invoking the courts to secure an equitable readjustment of our respective rights!

August 1947 Earnings

The earnings of the debtor for August 1947 and for the first eight months of 1947 are now available. Net earnings in August 1947, available for the payment of interest, were 25% greater than for the same month last year. The net earnings available for the payment of interest (before the deduction of taxes) for the first eight months of 1947 were $18,504,702, or at the annual rate of $27,757,056—more than two and one-half times the anticipated earnings of $11,000,000 upon which the plan was based—and more than twice the annual interest of $12,525,036 accruing on *all* the *old* indebtedness, including the convertible bonds, in satisfaction of which only 17% is to be paid under the plan.

Here are the official figures:

EARNINGS OF ROCK ISLAND

January 1-August 31, 1947

Earnings (after deduction of depreciation, amortization, and federal income taxes, and before deduction of interest accrued but unpaid on the old bonds)	$14,584,702.
Federal income taxes (added to earnings because taxes are deducted after bond interest has been paid)	3,920,000.
Total earnings, for 8 month period, available for interest on bonds	$18,504,702.
1947 annual rate of earnings available for bond interest	$27,757,056.

Interest on the old convertible bonds was earned more than 11½ times during the first eight months of this year, as shown by the following figures:

Earnings available for interest	$18,504,702.
Interest on old bonds senior to convertibles	7,221,600.
8 months' earnings available for interest on convertibles	$11,283,102.
8 months' interest on convertibles	$ 968,400.

The 8 months' earnings available for interest on the convertibles is greatly in excess of the entire payment proposed in the plan for the full satisfaction of such convertibles.

Respectfully submitted,

JOHN GERDES,
One Wall Street,
New York, New York.

HENRY F. TENNEY,
120 South La Salle Street,
Chicago, Illinois.
Counsel for Debtor-Petitioner.

New York, New York, September 29, 1947.

Supreme Court of the United States

In the Matter
of
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Debtor.*

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Debtor-Petitioner,*

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, et al., as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, et al., JOHN C. TRAPHAGEN, et al., JAMES G. BLAINE, et al., *Respondents.*

OCTOBER TERM, 1947

No. 184-189

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALEXANDER & GREEN,
120 Broadway,
New York 5, N. Y.
EDWARD W. BOURNE,
of Counsel.

WINSTON, STRAWN & SHAW,
First National Bank Building,
Chicago, Illinois.
FRANK H. TOWNER,
of Counsel.

Attorneys for Protective Committee for The Chicago, Rock Island and Pacific Railway Company General Mortgage Bonds due January 1, 1988.

WHITE & CASE,
14 Wall Street,
New York 5, N. Y.
JESSE E. WAID,
of Counsel.

WINSTON, STRAWN & SHAW,
First National Bank Building,
Chicago, Illinois.
FRANK H. TOWNER,
of Counsel.

Attorneys for Bankers Trust Company and R. G. Page, as Trustees of the General Gold Bond Mortgage of The Chicago, Rock Island and Pacific Railway Company, dated January 1, 1898.

KOOT, BALLANTINE, HARLAN,
BUSHBY & PALMER,
31 Nassau Street,
New York 5, N. Y.
WILKIE BUSHBY,
JOSEPH SCHREIBER,
of Counsel.

Attorneys for Metropolitan Life Insurance Company, as remaining member of the First and Refunding Group.

RATHBONE, PERRY, KELLEY & DRYE,
70 Broadway,
New York 4, N. Y.
ALEXANDER M. LEWIS,
of Counsel.

Attorneys for Central Hanover Bank and Trust Company and George S. Hovey, Trustees for First and Refunding Mortgage 4% Bonds of The Chicago, Rock Island and Pacific Railway Company.

SHEARMAN & STERLING & WRIGHT,
20 Exchange Place,
New York 5, N. Y.
SANFORD H. E. FREUND,
of Counsel.

Attorneys for The National City Bank of New York, Trustee for Secured 4½% Bonds, Series A, of The Chicago, Rock Island and Pacific Railway Company.

BEEKMAN & BOGUE,
15 Broad Street,
New York 5, N. Y.
EDWARD K. HANLON,
of Counsel.

Attorneys for Protective Committee for the Holders of First Mortgage 4½% Bonds of The Rock Island, Arkansas and Louisiana Railroad Company.

CAHILL, GORDON, ZACHRY & REINDEL,
63 Wall Street,
New York 5, N. Y.
DANIEL JAMES,
of Counsel.

Attorneys for Protective Committee for Choctaw, Oklahoma and Gulf Railroad Company Consolidated Mortgage 5% Gold Bonds, and Choctaw and Memphis Railroad Company First Mortgage 5% Gold Bonds.

INDEX

CITATIONS.

Cases:

Supreme Court of the United States

OCTOBER TERM, 1947

No. 184–189

In the Matter

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, et al., as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, et al., JOHN C. TRAPHAGEN, et al., JAMES G. BLAINE, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The respondents are the Protective Committee for The Chicago, Rock Island & Pacific Railway Company General Mortgage Bonds; the Trustees under The Chicago, Rock Island & Pacific Railway Company General Mortgage;

Metropolitan Life Insurance Company, as remaining member of the First and Refunding Group; the surviving Trustee under The Chicago, Rock Island & Pacific Railway Company First and Refunding Mortgage; the Trustee for the Secured 4½% Bonds, Series A, of The Chicago, Rock Island & Pacific Railway Company; the Protective Committee for the First Mortgage 4½% Bonds of the Rock Island, Arkansas and Louisiana Railroad Company; and the Protective Committee for Choctaw, Oklahoma and Gulf Railroad Company Consolidated Mortgage 5% Bonds and Choctaw and Memphis Railroad Company First Mortgage 5% Bonds.

This opposing brief is submitted under the number and title of the Debtor's application for certiorari. However, two additional petitions for certiorari have been filed seeking to review the same decision of the Circuit Court of Appeals,—one by the Preferred Stock Committee (No. 178-183) and the other by Gerald Axelrod, *et al.*, holders of unsecured Convertible Bonds (No. 190-193). The contentions made in the three petitions overlap, and to avoid duplication of opposing briefs the present brief will deal with all three petitions.

Two of the petitioners, the Preferred Stock Committee and the Debtor, have no real interest in the proceeding. The Interstate Commerce Commission found that the old stock had no value and in this was sustained by the District Court and the Circuit Court of Appeals when they approved the Plan, with petitions for writs of certiorari being denied by this Court. Consequently, the plan was never submitted to the stock interests for vote and they had no standing to appear in connection with confirmation in the courts below where the only issue was whether there had been justification for rejection of the plan by any class of creditors.

The third petitioner, a group of individual holders of a comparatively small but unspecified number of unsecured

Convertible Bonds, is not really representative of such bonds which have been represented in the proceeding by the Chase National Bank as Trustee under the Indenture for such bonds. Attorneys for this petitioner have pursued such an obstructive course throughout the proceeding that the Commission held that they had not made any contribution to the plan and refused them any allowance for fees or expenses (252 I. C. C. 209, 256-7; 254 I. C. C. 858). Their present petition and brief, like their previous briefs, is full of misstatements, misuses of figures and irrelevancies.

Opinions Below.

The first plan approved by the Interstate Commerce Commission resulted in numerous objections, which were passed upon by the District Court in *In re Chicago, Rock Island & Pacific Ry. Co.* (D. C. N. D. Ill. E. D. 1943), 50 F. Supp. 835. The District Court overruled most of the objections but sustained two and remanded the plan to the Commission, suggesting certain changes in addition to those necessary to meet the objections which it had sustained.

The modified plan, approved by the Commission on May 1, 1944, was approved by the District Court in an opinion dated May 14, 1945. *In re Chicago, Rock Island & Pacific Ry. Co.*, 67 F. Supp. 547. Appeals were taken to the Circuit Court of Appeals which affirmed the order of approval in *The Chicago, Rock Island & Pacific Ry. Co.* v. *Fleming* (C. C. A. 7, 1946), 157 F. (2d) 241.

Petitions for writs of certiorari were filed by the same three petitioners who filed the petitions now before this Court, and all were denied. *The Chicago, Rock Island & Pacific Ry. Co.* v. *Fleming* (1946), 329 U. S. 780; *Harrison* v. *Fleming* (1946), 329 U. S. 780; *Axelrod* v. *Fleming* (1947), 329 U. S. 811.

After the submission of the plan by the Commission to the creditors for acceptance or rejection, the District Court refused to confirm the plan, and directed that it be remanded to the Commission, in an opinion which is not reported but will be found in the printed record (R. 249-253). Appeals were then taken by the respondents to the Circuit Court of Appeals which reversed the order of the District Court and directed the District Court to confirm the plan. *In re Chicago, Rock Island & Pacific Ry. Co.* (C. C. A. 7, 1947), 160 F. (2d) 942. The Debtor's petition and the companion petitions of the Preferred Stock Committee and of Gerald Axelrod *et al.* are for writs of certiorari to review the order of the Circuit Court of Appeals directing the District Court to confirm the plan.

The companion petition of Gerald Axelrod *et al.* refers to other steps in the reorganization proceedings in connection with which opinions have been filed:

Aaron Colnon, the Co-Trustee appointed by District Judge IGOE, filed a petition on September 30, 1946, asking for authority to carry out what was "a new plan for the partial reorganization of the debtor", as the Circuit Court of Appeals later ruled. This "new plan" had never been before the Interstate Commerce Commission as required by Section 77. Mr. Colnon's petition is attached to the copy of the statement of Mr. Colnon which has been filed in this Court by Gerald Axelrod *et al.* and which is referred to in their brief at page 44. On November 22, 1946, District Judge IGOE handed down an order "which in substance approved a new plan for the partial reorganization of the debtor and authorized the initial steps toward the consummation of the new plan." This characterization of the order is taken from the opinion of the Circuit Court of Appeals, which reversed the order. *In re Chicago, Rock Island & Pacific Ry. Co.* (C. C. A. 7, 1947), 160 F. (2d) 949. Judge IGOE handed down no opinion when he approved Mr. Colnon's new plan.

After the Circuit Court of Appeals had entered its two orders, one directing the District Court to confirm the plan which had been approved by the Commission, by the District Court and by the Circuit Court of Appeals, and the other reversing the District Court's approval of Mr. Colnon's new plan, Judge IGOE undertook to change the Commission's plan before confirming it so that the District Judge would have the power to name a majority of the reorganization managers. Under the plan a majority of the reorganization managers can, among other things, name the members of the first board of directors. Judge IGOE's opinion of May 23, 1947, not reported, and his so-called "Order Confirming Plan of Reorganization" of the same date can be found in the brief of the petitioners Gerald Axelrod *et al.* at pages 64-78. The present respondents filed a petition with the Circuit Court of Appeals for a writ of mandamus directing the District Court to carry out the mandate of the Circuit Court of Appeals and confirm the plan without change, and, after argument, the Circuit Court of Appeals granted the writ and rendered an opinion, not yet reported, a copy of which can be found at pages 79-82 of the brief of the petitioners Gerald Axelrod *et al.*

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. Sec. 47(c)).

QUESTION PRESENTED.

If there can be said to be any question presented by the petition of the Debtor and the companion petitions, it is whether or not a District Court has an unfettered dis-

cretion to refuse to confirm a plan of reorganization, i. e., a personal power, arbitrarily and without regard to the record before the District Court, to remand to the Interstate Commerce Commission a previously approved plan and thus to effect a "blockade" of further reorganization. We submit that there is no basis for the contention that the District Court was vested with an unrestricted personal power to refuse to confirm the plan,—a power not subject to review no matter how arbitrarily exercised.

As a part of this question, petitioners argue that the order of the District Court was not appealable because of the absence from Section 77 itself of any express provision for review. However, orders of the District Court in proceedings under Section 77 of the Bankruptcy Act, whether interlocutory or final, are clearly reviewable under Section 24(a) of the Bankruptcy Act.

STATEMENT OF THE CASE.

A relatively brief statement of the case, together with the opinion which the Circuit Court of Appeals handed down when it directed the District Court to confirm the plan, will be sufficient to establish that none of the three petitions raises any substantial questions for decision by this Court.

Brief History of the Proceeding Prior to the Hearing on Confirmation: On June 7, 1933, more than 14 years ago, this proceeding was commenced with high hopes for reasonably prompt reorganization. Due to a combination of circumstances the hearings before the Interstate Commerce Commission were not commenced until October 6, 1936, and were not concluded until July 27, 1938. In September, 1939, the hearing Examiner issued a proposed report. On October 31, 1940, the Commission issued a report and order approving a plan of reorganization. *Chicago, Rock Island & Pacific Ry. Co. Reorganization,*

242 I. C. C. 298. Petitions for modifications were thereafter filed within the 60-day period allowed by Section 77, and on July 31, 1941, a supplemental report approving an amended and modified plan was issued by the Commission. *Chicago, Rock Island & Pacific Ry. Co. Reorganization,* 247 I. C. C. 533. On October 2, 1941, the Commission issued a report on further consideration to correct "certain errors and inconsistencies in the approved plan which should be eliminated." *Chicago, Rock Island & Pacific Ry. Co. Reorganization,* 249 I. C. C. 297.

Hearings on the objections to the plan were held in the District Court in October, 1941. But the decisions of the Circuit Courts of Appeals in the *Western Pacific* and *Milwaukee* cases and this Court's allowance of writs of certiorari to review those decisions resulted in a suspension of further proceedings in connection with the plan until this Court handed down its opinions in *Ecker* v. *Western Pacific Railroad Corp.* (1943), 318 U. S. 448, and *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943), 318 U. S. 523.

After this Court's opinions in those two cases had been handed down, further briefs were submitted to the District Court and in June, 1943, that Court disapproved the plan and remanded it to the Commission. *In re Chicago, Rock Island & Pacific Ry. Co.,* 50 F. Supp. 835. While the District Court disapproved the Commission's plan, it overruled most of the very large number of objections which had been filed thereto and sustained only two—one relating to the treatment of the underlying General Mortgage Bonds, which was disapproved in the light of this Court's opinion in the *Milwaukee* case, and the other relating to the ratification of the nominations of reorganization managers. In addition, however, the District Court pointed out that the large accumulations of earnings would permit the Commission to provide for (1) a large cash distribution, (2)

the elimination of any provision for the sale of new first mortgage bonds to raise cash, and (3) the distribution to the creditors of an additional amount of first mortgage bonds equal to those which would have been sold under the plan previously approved by the Commission.

A further hearing was held by the Commission in September, 1943, and on January 3, 1944, the Commission issued a further report and order approving an amended and modified plan. *Chicago, Rock Island & Pacific Ry Co. Reorganization,* 257 I. C. C. 265. Petitions for further modifications were then filed within the 60-day period allowed by the statute, and on May 1, 1944, the Commission issued its final order modifying in minor respects the plan which had been approved on January 3, 1944. *Chicago, Rock Island & Pacific Ry. Co. Reorganization,* 257 I. C. C. 307.

At the hearing in September, 1943, and in the briefs filed with the Commission prior to the reports of January 3, 1944, and May 1, 1944, substantially all the contentions now advanced by the petitioners were urged before the Commission. One of the contentions now made by the Debtor and by the other petitioners is that the Commission failed to consider alleged changed circumstances, the accumulation of war earnings, etc. As we will point out in more detail below, (1) the Commission made drastic changes in the plan which it had previously approved, so as to recognize the accumulation of war earnings, providing for a cash distribution of $38,011,922 and for the distribution to the creditors of $11,000,000 of First Mortgage Bonds which were to be sold for new money under the original plan, and (2) as clearly appears from the passages in the reports of the Commission which were later quoted by the Circuit Court of Appeals (R. 341-342), the Commission considered whether the war earnings justified a permanent increase in the capital structure and decided that they did not.

After the Commission's order of May 1, 1944, had been certified to the District Court, a hearing was held on the objections to the approval of the plan on June 23, 1944. A long period then elapsed before the District Court passed upon the objections. In the meantime the District Court ordered that the claim of the Reconstruction Finance Corporation be paid. Subsequently on May 14, 1945, the District Court filed its opinion approving the plan, and on June 15, 1945, an order approving the plan was entered. *In re Chicago, Rock Island & Pacific Ry. Co.*, 67 F. Supp. 547.

Appeals were immediately taken to the Circuit Court of Appeals by the three present petitioners. While the necessary steps were being taken in connection with those appeals, the Commission submitted the plan to the creditors for acceptance or rejection pursuant to the provisions of Section 77 of the Bankruptcy Act.

The results of the submission were certified by the Commission to the District Court on February 28, 1946. The certification disclosed that the holders of the mortgage bond issues (other than the Little Rock and Hot Springs Western First Mortgage Bonds) who voted on the approved plan voted to accept it as follows (R. 93-104):

General Mortgage Bonds	94.89%
First and Refunding Mortgage Bonds	97.70%
Secured 4½% Bonds, Series A	98.17%
Burlington, Cedar Rapids & Northern Railroad Company Consolidated Mortgage Bonds	96.11%
Choctaw, Oklahoma & Gulf Railroad Company Consolidated Mortgage Bonds	97.90%
Rock Island, Arkansas and Louisiana Railroad Company First Mortgage Bonds	96.72%
St. Paul and Kansas City Short Line Railroad Company First Mortgage Bonds	97.71%

A majority in amount of those voting in two classes, the holders of the Little Rock and Hot Springs Western First Mortgage Bonds and the holders of the unsecured Convertible Bonds, voted to reject the plan.

It may be noted at this point that no representative of any holder of the Little Rock and Hot Springs Western First Mortgage Bonds later objected to the confirmation of the plan and that the District Court's refusal to confirm the plan was not based on the vote of the holders of the Little Rock and Hot Springs Western First Mortgage Bonds.

The appeals from the District Court order approving the plan were not argued in the Circuit Court of Appeals until April 11, 1946. Consequently the results of the submission, as certified by the Commission on February 28, 1946, were forcefully brought to the attention of the Circuit Court of Appeals in the briefs and on the argument.

On May 23, 1946, the Circuit Court of Appeals unanimously affirmed the District Court's approval of the plan. *The Chicago, Rock Island & Pacific Ry. Co.* v. *Fleming,* 157 F. (2d) 241.

Three petitions for writs of certiorari to review the order of the Circuit Court of Appeals were then filed with this Court by the present three petitioners. The contentions now advanced by the petitioners were presented to this Court in those petitions (except only the contention which is now made that the District Court's refusal to confirm could not be reviewed on appeal). All three petitions were denied, two on November 18, 1946, and the third on February 3, 1947. *The Chicago, Rock Island & Pacific Ry Co.* v. *Fleming* (1946), 329 U. S. 780; *Harrison* v. *Fleming* (1946), 329 U. S. 780; *Axelrod* v. *Fleming* (1947), 329 U. S. 811.

The District Court's Refusal to Confirm the Plan: Considerably before the argument in the Circuit Court of

Appeals with respect to the approval of the plan, the District Court had ordered a hearing on the confirmation of the plan. However, requests for adjournment were made and by a succession of orders the confirmation hearing was adjourned until June 11, 1946.

The reasons urged for these adjournments were that (R. 138):

1. The District Court should await the outcome of the appeals to the Circuit Court of Appeals from the District Court's order approving the plan.

2. The District Court should await the decision of this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company.*

3. The District Court should await legislation by Congress affecting railroad reorganizations.*

The Circuit Court of Appeals affirmed the approval of the plan on May 23, 1946. The confirmation hearing was held on June 11, 1946, as already noted. This Court's opinion in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company,* 328 U. S. 495, was handed down on June 10, 1946 and copies were available in Chicago at the time of the hearing on June 11, 1946 and briefs on the objections to the confirmation were filed in which this Court's opinion in the *Denver* case was fully discussed. However, on June 28, 1946, the District Court handed down an opinion and order refusing to confirm the plan and referring the case back to the Interstate Commerce Commission (R. 249-255).

The District Court's opinion is an extraordinary document.

Although the hearing on the confirmation had been deferred over three months and the reasons given were

* This Court's two opinions in the *Denver* case disclose that it is familiar with developments in Congress relating to railroad reorganization legislation. A bill, S.1253, was passed by both houses of Congress on or about August 3, 1946, and disapproved by the President on or about August 13, 1946. No further legislation has thus far been passed.

that the District Court should have the benefit of the opinion of the Circuit Court of Appeals on the appeals relating to the approval of the plan and of this Court's opinion in the *Denver* case, the District Court did not so much as mention either of those opinions and its rulings were made in the teeth of both of them.

Much the largest part of the opinion was devoted to a discussion of what was taking place in Congress and what was being said about railroad reorganizations (R. 250-252, 253). The District Court based its decision primarily on Congressional comments despite the explicit statement on that subject in this Court's opinion in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company,* 328 U. S. 495, 509-511, the gist of which is that it is the duty of the courts to enforce the statutes as they are, not to base their decisions on possibilities of future legislation. This Court's statement on the subject was quoted fully to the District Court in the joint brief filed on behalf of those who were urging confirmation of the plan but apparently no attention whatever was paid to it.

In a comparatively short passage (R. 252), which the Debtor has quoted in its petition (p. 4), the District Court purported to refer to the factual situation. However, as the Circuit Court of Appeals later pointed out in its opinion (R. 334-335, footnote 1):

> "In his [the District Court's] opinion, no distinction was made between developments which took place prior to the approval of the plan by the Commission on May 1, 1944, or the District Court on June 15, 1945, and developments which took place after one or both of those dates * * *."

Indeed, as we shall point out later, all of the developments of any importance to which the District Court referred took place prior to the approval of the plan.

The District Court's order was also extraordinary, not only in that it constituted a refusal to confirm the plan, but because it contained an express finding that the plan "does not make adequate provision for fair and equitable treatment for the interests or claims of the holders of the Convertible Bonds" (R. 254). This holding was, of course, the exact reverse of the holding which the District Court had previously made in approving the plan, and which the Circuit Court of Appeals had affirmed unanimously. Furthermore, in approving the plan the District Court had discussed the objections of the group of Convertible Bondholders in some detail and had overruled them, *In re Chicago, Rock Island & Pacific Ry. Co.* (1945), 67 F. Supp. 547, 551, and they had been discussed in the opinion of the Circuit Court of Appeals affirming the District Court's approval of the plan. *The Chicago, Rock Island & Pacific Ry. Co.* v. *Fleming* (1946), 157 F. (2d) 241, 249-250. Yet the District Court's opinion refusing to confirm the plan did not so much as mention the Convertible Bonds except in a general statement (R. 253) that the Court was "holding out hope to the junior creditors" but that "it would be vain for the junior creditors to expect to be made whole."

The Appeals to the Circuit Court of Appeals and Other Developments: The present respondents immediately appealed to the Circuit Court of Appeals from the District Court's refusal to confirm the plan and the appeals were brought on as promptly as possible. However, they could not be heard until January 30, 1947.

In the meantime Co-Trustee Colnon brought on the petition, already mentioned, a copy of which is attached to Mr. Colnon's statement filed by the petitioners Gerald Axelrod *et al.* and referred to in their brief at page 44. As will be seen from Mr. Colnon's petition, he proposed an entirely new plan, contemplating that to a very large extent it would be carried out by the District Court quite

independently of the Interstate Commerce Commission by buying in mortgage bonds and effecting various exchanges of securities and that thereafter the balance of the plan would be sanctioned by the Interstate Commerce Commission. Mr. Colnon's proposal contains so many illegal and inequitable features that it seems superfluous to stress any of them, but it will be observed from page 4 of his statement that, while the Commission approved a total bonded indebtedness of $110,917,060, Mr. Colnon proposed a total bonded indebtedness of $210,406,000. His whole plan and all his assertions as to the fairness of his plan—untenable as they were for many other reasons—were predicated on a mere assumption that the Commission would adopt the capital structure which he proposed.

On November 22, 1946, after hearing the opposition to Mr. Colnon's plan, the District Court entered an order which was later correctly described by the Circuit Court of Appeals: the order "in substance approved a new plan for the partial reorganization of the debtor and authorized the initial steps toward the consummation of the new plan." Appeals were duly taken from the order of November 22, 1946, and the appeals from that order were argued at the same time as the appeals from Judge IGOE's order of June 28, 1946, refusing to confirm the plan.

Because of the importance of the case the Circuit Court of Appeals set the appeals down for argument specially and an entire Court day was devoted to the arguments on January 30, 1947. Much the largest part of the time taken on the arguments was devoted to the appeals from the order relating to the confirmation of the plan, to which the pending petitions for certiorari relate.

The appellants—the present respondents—contended that Judge IGOE had utterly ignored the applicable rules of law in passing on the question of confirmation; that

those rules of law as applied to the facts in the record required that the plan be confirmed; and that the Circuit Court of Appeals should reverse Judge IGOE's arbitrary action and direct him to confirm the plan.

On February 21, 1947, the Circuit Court of Appeals handed down two opinions reversing the two orders appealed from. Petitions for rehearing were subsequently filed and were denied on April 7, 1947.

Unlike the opinion of the District Court, the opinion of the Circuit Court of Appeals discussed the facts carefully and accurately, leading to a judicial conclusion based on the facts and applicable rules of law as laid down by this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company* (1946), 328 U S. 495. Reference will be made later to particular subjects dealt with in the opinion. A reading of the opinion, however, will demonstrate that all of the parties received the benefit of the kind of judicial decision to which they were entitled—an application of the law to the facts of the case.

Since the petitions relate to the order of the Circuit Court of Appeals directing that the plan be confirmed, developments subsequent to entry of that order are hardly relevant. But they should be mentioned briefly, since they are referred to by the petitioners Gerald Axelrod *et al.*

Instead of confirming the plan, as the Circuit Court of Appeals had directed, Judge IGOE filed an opinion and order on May 23, 1947, by which he undertook to change the plan so as to have the power himself to appoint three of the five reorganization managers. (See brief of Gerald Axelrod *et al.*, p. 64-78.) Since the reorganization managers will name the first Board of Directors, the power to appoint a majority of the reorganization managers is potentially equivalent to the power to name

the original Board of Directors. A petition for a writ of mandamus was filed with the Circuit Court of Appeals by the respondents and, after argument, it was granted and the District Court then eliminated its attempted change in the plan (*id.* 79-82).

Other efforts to defeat the plan which took place during the period subsequent to the Circuit Court of Appeals, order of February 21, 1947 are, with one exception, not disclosed by the record in this Court. The exception is the statement submitted by Mr. Colnon, Co-Trustee appointed by Judge IGOE, before a subcommittee of the Senate Committee on Interstate and Foreign Commerce, which has been filed by Gerald Axelrod *et al.* It is unnecessary to discuss that statement except to say that a mere reading of it will show that Mr. Colnon (acting independently of the Senior Trustee, who was appointed by the Judge administering the case before Judge IGOE took over the administration, from a panel named by the Interstate Commerce Commission) sponsored a new plan, which was illegal and grossly inequitable and then attempted to support his new plan by baseless charges against those who sought consummation of the approved plan.

ARGUMENT.

I.

THE FACTS OF THIS CASE ARE EXTRAORDINARILY SIMILAR TO THOSE IN *RECONSTRUCTION FINANCE CORPORATION* v. *DENVER & RIO GRANDE RAILROAD COMPANY*, 328 U. S. 495.

The facts of this case are amazingly similar to those in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Railroad Company* (1946), 328 U. S. 495.

In the *Denver* case the senior bondholders voted to accept the plan, as have the senior bondholders in this

case with the exception of the holders of the Little Rock and Hot Springs Western First Mortgage Bonds, whose failure to cast a favorable vote is not significant in view of the absence of any objection to the confirmation of the plan on that ground.

In the *Denver* case 79.33% of the holders of the junior bond issue voting on the plan cast adverse ballots. In this case 75.78% of the holders of the unsecured Convertible Bonds and other unsecured claims who voted cast adverse ballots.

The *Denver* plan was approved by the Commission on June 14, 1943, and called for an "effective date" of January 1, 1943. The Rock Island plan was approved by the Commission on May 1, 1944, and called for an "effective date" of January 1, 1944.

The war earnings of the two railroads preceding and following the approval of the plans were very much greater than the "normal" earnings forecast by the Commission.

In each case the plan was approved by the Commission at a time of extraordinarily large earnings and subsequent earnings declined. This will appear from the following table of their earnings before interest charges, the *Denver* earnings being taken from this Court's opinion (328 U. S. 514, 518) and the Rock Island earnings being taken from the opinion of the Circuit Court of Appeals (R. 339) and from the record (R. 242):

Year	*Denver*	*Rock Island*
1942	$17,044,420	$35,112,693
1943	11,573,668	37,037,708
1944	8,157,880	26,415,919
1945	—	20,444,571

As appears from page 30 of the Debtor's petition, the Rock Island's earnings before interest in 1946 were

$16,578,161, so that in each of the years 1944, 1945 and 1946 there was a substantial decline in earnings from those of the previous year.

In each of the two cases large amounts of cash accumulated in the estate subsequent to the so-called "effective date" of the plan. The principal reasons for the accumulations were (1) the exceptionally large earnings and (2) the failure to pay out any of the earnings as interest on the old securities or to pay interest or dividends on the new securities from the "effective dates" of the respective plans.

In each case some of the accumulated earnings were used to retire debt and the retirement of debt was urged as a ground for a reconsideration of the plan approved by the Commission.

As already noted, this Court's opinion in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Railroad Company,* 328 U. S. 495, was handed down on June 10, 1946, prior to Judge IGOE's refusal to confirm the plan and it was fully briefed in the District Court. Yet Judge IGOE's opinion does not mention the *Denver* opinion and the grounds which he advanced for refusing to confirm the plan were advanced in the teeth of the most explicit rulings by this Court.

II.

THERE ARE FACTORS PRESENT IN THIS CASE WHICH ASSURE THE FAIRNESS OF THE ROCK ISLAND PLAN.

As the Circuit Court of Appeals found in its two opinions, the plan approved by the Commission fails to provide in full for the claims of the mortgage bondholders and the aggregate amount of the deficiencies on the various issues is more than $106,000,000 (157 F. (2d) 241, 246-8;

160 F. (2d) 942, 943).* In addition, unsecured creditors have a deficiency of $39,600,000 (taking new no par common stock at $50 a share) which makes a total creditor deficiency of $145,000,000 which is not provided for in the plan of reorganization.

The claims of the stockholders accordingly were held to be without value by the District Court, the Circuit Court of Appeals affirmed, and this Court refused to review the order of the Circuit Court of Appeals, as already noted.

Furthermore, although Judge IGOE refused to confirm the plan, he said that (p. 253):

> "with the most optimistic approach by the Commission it would be vain for the junior creditors to expect to be made whole."

It follows that even in Judge IGOE's view there was nothing left for the stockholders, if the rule of priorities enunciated by this Court in the *Western Pacific* and *Milwaukee* cases is to be followed.

In view of the enormous amount, over $145,000,000, which would have to be made up before the stockholders could participate, the only possible issues in this case re-

---

*This appears from the following table showing the deficiencies in the secured creditors claims which would remain after receipt of the new securities and cash allocated to them under the plan of reorganization (257 I. C. C. at p. 319). The deficiencies are calculated by taking new no par value common stock at $50 per share, the amount which it has been adjudicated by the Commission and the District Court to be worth in determining that the General Mortgage Bonds will have no deficiency under the present plan (257 I. C. C. at pp. 276-83, 310-12; 67 F. Supp. at p. 549).

Secured Claims	Claim at Jan. 1, 1944	Deficiency taking new common at $50
General Mortgage	$ 86,213,400	None
C. & M. First Mortgage	5,286,000	None
First and Ref.	156,870,859(A)	$ 57,606,900
Secured 4½s	59,021,174	18,569,382
C. O. & G.	8,296,867	872,239
St. P. & K. C. S. L.	27,495,118(A)	13,404,485
R. I. A. & L.	16,362,500	5,922,916
B. C. R. & N.	16,912,500	9,539,383
Total	$376,458,418	$105,915,305

(A) Includes bonds now outstanding, formerly pledged for bank loans.

lated to the treatment of the various classes of creditors. And the basis for Judge IGOE's order refusing to confirm the plan was, as stated in his order but not in his opinion, that it did not provide for "fair and equitable treatment for the interests or claims of the holders of the Convertible Bonds" (R. 254).

The original fairness of the plan to the holders of the Convertible Bonds was established by the decision of the District Court approving the plan, by the affirmance of that decision by the Circuit Court of Appeals and by this Court's refusal to grant writs of certiorari. And the Rock Island plan contains a feature which prevents changes in conditions from making an originally fair plan subsequently unfair to the holders of the Convertible Bonds except in one contingency so remote as not to require serious mention.

That feature of the plan is this: under the plan an allotment of new common stock is made to every class of creditors, including the holders of the Convertible Bonds. The allotment of new common stock made to the holders of the Convertible Bonds and other unsecured claims was based on the value, as found by the Commission, of the unmortgaged assets. There was allotted to the unsecured creditors *all* the securities (common stock) to be issued in respect of the unmortgaged assets. The secured creditors did not share in such securities even in respect of their deficiency claims. The allotments of common stock made to the secured creditors were based on the value of the mortgaged assets as found by the Commission. As a result the plan operates automatically to meet any changes in conditions. As the Circuit Court of Appeals said (R. 333-334):

> "Under the plan, out of a total issue of 1,522,672 shares of the common stock, 160,078 shares are allotted to the holders of the Convertible Bonds. The result was to provide for the holders of these bonds a 10.68% interest in the equity of the reorganized

company, and if the plan is consummated, the Convertible bondholders will participate in any larger earnings than the Commission's forecast anticipated."

If the earnings had increased unexpectedly, or if it had proved possible to retire more debt than had been visualized when the plan was approved, the plan would not thereby have become inequitable, since the holders of the Convertible Bonds would receive the benefit through their participation in the common stock allotment. They would receive proportionately greater benefit than secured creditors from subsequent developments favorable to the new common stock equity since their entire recognition is in new common stock, and secured creditors, obtaining most of their recognition in senior securities with limited interest or dividend rights, would have relatively less benefit from developments favorable to the common stock equity. In other words, the unmortgaged assets to which unsecured creditors would have a right to look were at most 5% of the total assets, yet the unsecured creditors, through getting 10% of the Common Stock, receive 10% (not just 5%) of the excess earnings of all the properties over and above the limited amounts needed to service the senior securities.

The only contingency in which the plan could have become unfair would have been the realization of unanticipated earnings so great as to result in actually overpaying one or more classes of secured bonds. It has not been and could not be seriously contended that that has taken place. We have already presented in an earlier footnote herein a table showing that most of the secured classes of creditors have enormous deficiencies which are not to be recognized under the plan, even in face amount of new securities. That table calculated the deficiencies taking new common stock at $50 a share, but there would still be enormous deficiencies if new common stock is taken at $100 a share.

The only petitioners mentioning the subject are Gerald Axelrod, et al., who argue briefly that the holders of the General Mortgage Bonds are overcompensated (p. 50-51). Those petitioners undertake to show that the plan results in over-compensation of the holders of the General Mortgage Bonds but they do so by (1) disregarding the large claim on a General Mortgage Bond for accrued interest to the "effective date" of the plan and thus grossly understating the amount of the claim, and (2) treating the new no par value common stock as if it were allotted at $100 per share, whereas it was allotted at approximately $50 per share, as appears in the petitioners' brief (p. 50).

Later we will show, using market value tables similar to those used in *Insurance Group Committee* v. *Denver & R. G. W. R. Co.* (1947), 329 U. S. 811, that any contention that any of the secured creditors are over-compensated is wholly without substance.

III.

THE REASONS ADVANCED BY THE DISTRICT COURT AND BY THE PETITIONERS WHY THE PLAN SHOULD NOT HAVE BEEN CONFIRMED ARE WHOLLY WITHOUT MERIT.

The Debtor bases its petition on the grounds advanced by Judge IGOE for his refusal to confirm the plan (p. 4), and if the numerous contentions advanced by the other petitioners be analyzed, it will be found that most of them are similar to those urged by the Debtor.

The reasons for Judge IGOE's refusal to confirm the plan, as disclosed by his opinion, fall into two categories.

A. Possibilities of Legislation.

Much the largest part of Judge IGOE's opinion consisted of quotations from statements made in Washington critical of completed and pending plans (R. 249-252, 253).

In the brief filed by the appellants (these respondents) in the Circuit Court of Appeals it was established (p. 28-38) that some of the quoted statements were demonstrably incorrect and that others notably the quotations from certain testimony given by Commissioner Mahaffie of the Interstate Commerce Commission, had been torn from their context. It is unnecessary to make the same showing in this Court, since in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946), 328 U. S. 495, 510-512, this Court said (footnotes omitted):

> "Although the results of reorganizations under the section, as thus construed, have been criticized as unfortunate and changes have been suggested, no different legislation has been enacted. Indeed a different method for reorganization, enacted in 1939 and designed to meet the requirements of railroads not in need of financial reorganization of the characted provided by § 77 but only of an opportunity for voluntary adjustments with their creditors, terminated on July 31, 1940, and a comparable provision made in 1942 was allowed to lapse on November 1, 1945. This situation leaves clear the duty of the agencies of the Government entrusted with the handling of reorganizations under § 77, including this Court, to administer its provisions according to their best understanding of the purposes of Congress as expressed in the words of § 77 read in the light of the contemporaneous discussion in Congress. Changes in economic conditions cannot affect the powers of the reorganization agencies even though such changes may require a re-examination into the present fairness of the former exercise of those powers."

B. Alleged Changed Conditions.

The District Court said in a passage quoted by the Debtor at page 4 (R. 252):

> "In the present case we have a plan that except for slight modifications was prepared by the Com-

mission in 1940 and rests on studies of earnings, etc., going back to 1937 and even beyond.

"Against that we find the Debtor today with cash or equivalent of over $70,000,000; with an R. F. C. loan aggregating, principal and interest in excess of $18,000,000 paid in full; with the entire first mortgage of the Peoria Terminal Co., to all intents and purposes paid in full; with over 20% of the Choctaw & Memphis first mortgage retired; and with an amazing reduction, in the interim, of equipment debt. Three classes of creditors set up in the original plan have disappeared—the banks, the R. F. C., and the Peoria Railway Terminal Co.

"The above recital does not take into account the tremendous sums expended over the period on improvement of road and equipment, nor does it include the retirement of debt on jointly owned facilities such as the Joliet and Denver terminals."

As the Circuit Court of Appeals subsequently pointed out (R. 334, footnote 1), "no distinction was made between developments which took place prior to the approval of the plan by the Commission on May 1, 1944, or the District Court on June 15, 1945, and developments which took place after one or both of those dates."

We shall briefly take up, item by item, the alleged changes in conditions which are mentioned in the District Court's opinion and in the petitioners' briefs.

(1) The Basis for the Plan; Study of Earnings.

The first point made by the Court was that (R. 252):

> "In the present case we have a plan that except for slight modifications was prepared by the Commission in 1940 and rests on studies of earnings, etc., going back to 1937 and even beyond."

As to this statement:

First: The first plan certified by the Commission to the Court, which was approved by the Commission in

July, 1941, provided for no cash distribution whatever and for the issuance of $11,000,000 of new first mortgage bonds which would be sold to raise new money (242 I. C. C. 298, 478). Extraordinary war earnings intervened between July, 1941 and May 1, 1944, when the plan now under consideration was approved by the Commission (257 I. C. C. 307). The Commission in 1944 accordingly eliminated the provision for the raising of new money and provided for the distribution to the creditors of (1) $38,011,922 of cash and (2) an additional $12,409,600 of first mortgage bonds, a total of $50,421,522. These modifications were not "slight". In effect, war earnings in the amount of over $50,000,000 were applied to the claims of the creditors under the plan. Even with these additional allotments, there still remained an enormous deficiency in the claims of secured creditors which was given no recognition whatever in the plan.

Second: While the capital structure approved in the first plan, certified in July, 1941, was not greatly changed by the second plan approved in May, 1944, the Commission's refusal to change it was the result of an exercise of its best judgment that war earnings were not a proper basis on which to found a permanent capitalization.

When the case was remanded to the Commission in 1943 vigorous requests were made for an increase in the capitalization, both before the Commission issued its report of January 3, 1944 and in connection with the petitions for modifications of that report.

The Commission considered in both its Report of January 3, 1944 and its Report of May 1, 1944 demands for changes in the capital structure which are altogether similar to those now made by the petitioners.

Exercising its judgment that the economic conditions which made the war earnings possible were not of a permanent character, the Commission rejected the demands

for important changes in the capitalization. The Circuit Court of Appeals later quoted in its opinion from each of these two reports of the Commission (R. 341).

A similar exercise of judgment by the Commission was not merely approved, but endorsed, by this Court in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943), 318 U. S. 523, 543-544.

The District Court's criticism that the capital structure rests on "studies of earnings, etc., going back to 1937 and even beyond" will not survive analysis (R. 252). The "studies of earnings, etc., going back to 1937 and even beyond" were made in order to try to forecast the "normal" income of the future. Certainly, studies of the past are useful in an attempt to forecast the future.

Third: There were no unanticipated, large earnings after approval of the plan, such as referred to by this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande R. R. Co.* (1946), 328 U. S. 495, 533-535. On the contrary, the unexpectedly early end of the war resulted in an earlier decline of the Rock Island's extraordinary war earnings than was presumably anticipated when the plan was approved. From the year in which the Commission held its hearing on the plan to and including the year in which Judge Igoe refused to confirm it, the decline was steady and substantial, as shown by the table previously given:

Year	*Earnings Before Interest*
1943	37,037,708
1944	26,415,919
1945	20,444,571
1946	16,578,161

Fourth: As noted in Point II, even if there had been unanticipated large earnings, the plan would not have been unfair on that account. This subject was not discussed by Judge Igoe, although fully briefed before him.

(2) 1947 Earnings.

All of the petitioners refer to the fact that thus far the earnings in 1947 have been better than in 1946, and various forecasts or assertions are made about earnings for the entire year of 1947. In addition, comparisons are made between those earnings and the interest charges on the old securities, as, for example, in the tables at the end of the Debtor's petition.

As to these contentions:

There is no reliable forecast of the earnings for the year 1947. Furthermore, it is a matter of common knowledge that railroads like the Rock Island are being greatly helped in 1947 by extraordinary grain movements to Gulf and other ports, and no one can tell how long those movements will last.

Even more important, a comparison of current earnings with old fixed charges is meaningless in the case of the reorganization of a railroad like the Rock Island, for two reasons:

1. The comparison wholly ignores the vast amount of accrued and unpaid interest. As of the "effective date" of the plan, the accrued and unpaid interest aggregated $130,889,661. This figure is obtained by a calculation from the table appearing in the Interstate Commerce Commission report approving the modified plan (257 I. C. C., at p. 318), with adjustments on account of the subsequent sale of pledged bonds by the Banks and the payment of the R. F. C. loan. The cash distribution of $38,011,922 provided for in the plan (less the $3,732,172 allotted to the R. F. C.) may be treated as applicable in reduction of the accrued and unpaid interest, but this still leaves almost $100,000,000 of accrued and unpaid interest as of January 1, 1944. Since that so-called "effective" date of the plan interest has accrued in an amount larger than $38,011,922.

Under this Court's decisions proper provision must be

made in a plan for accrued and unpaid interest. If such interest is not paid, the claims for it must be represented by new securities to the extent that there are new securities available for that purpose. Those new securities have to be serviced; if they are bonds, interest must be paid, and if they are stock, there should be a prospect that dividends will be paid. A calculation such as that made by the Debtor, which simply disregards accrued and unpaid interest, is, therefore, quite meaningless in considering whether a particular plan or reorganization is "fair and equitable" or whether it is feasible to develop a better one.

2. The earnings available for interest of $16,578,161 in 1946 are calculated after deduction of Federal income taxes which have been arrived at by deducting the annual interest on the old bonds. But under the plan of reorganization the interest charges are reduced to less than half of the present charges, with creditors being allotted stock for a large portion of their claims. No one has disputed that there had to be a substantial reduction in interest charges in any reorganization. It follows that interest deductions for income tax purposes would be reduced under the reorganization plan, and that the Federal income tax liability would be substantially increased. Using present tax rates, there would be an increase of several million dollars in the income tax liability, and a corresponding reduction of several million dollars in the $16,578,161 of 1946 earnings.

Furthermore, the petitioners, in claiming that the 1946 earnings available for interest of $16,578,161 were unexpectedly large, not only ignore the fact that these are the lowest annual earnings since the 1943 earnings of $37,000,000, but also give no recognition to the fact that $16,500,000 of earnings are barely sufficient to service the new bonds and preferred stock issuable under the plan of reorganization and leave earnings of about $3.50 per share of new common stock. Earnings of that amount on the new common stock can hardly be considered as unexpectedly

large in relation to the new capitalization. If some earnings had not been expected for the new common stock being allotted to creditors for their claims, the Interstate Commerce Commission would hardly have included it in the new capitalization. In the light of these earnings, the new common stock is selling on a "when issued" basis at only about 28½.

(3) The Accumulation of Cash.

The next statement made in the Court's opinion is that (R. 252):

> "we find the Debtor today with cash, or equivalent of over $70,000,000."

As already noted, when the District Court remanded the original plan to the Commission in June, 1943, it expressly suggested that any cash available for that purpose be distributed to the creditors. When the hearings were held before the Commission in September, 1943, statements were submitted by the Trustees showing how much cash could safely be distributed as of the proposed "effective date", January 1, 1944, and the Commission modified the plan to provide therein for distribution of all such available cash ($38,000,000). One of the Trustees who filed the statement was Co-Trustee Colnon, who later made many wildly exaggerated assertions as to the amount of "available" cash in the estate.

The actual situation will be found by examining a statement showing the total amount of cash and cash equivalents and the "net cash"—the "available" cash—on June 1, 1946 (R. 238-239). That statement was prepared by the Trustees of the Debtor and introduced as an exhibit by the Trustee of the Convertible Bonds at the confirmation hearing on June 11, 1946 and showed the actual situation at the time when Judge Igoe refused to confirm the plan.

The statement shows that, while there were cash and cash equivalents on June 1, 1946, of $77,563,059, the "net

cash" — the "free" or "available" cash — was only $10,997,108.

The principal reasons for the difference are accounted for by the following items:

Accrued Taxes, Cash Reserve and Working Capital	$33,886,514
Requirements for Additions and Improvements	12,313,130
Plan Requirements (to service the new Bonds and Preferred Stock only)	19,166,786

Of the first item, liabilities for taxes totaled $21,423,000. The balance of the first item and the second item require no explanation. The third item can be explained briefly.

As already stated, the plan has a so-called "effective date" of January 1, 1944. This means that the new bonds and preferred stock (and common stock, if it is to have any value) will be entitled to interest and dividends from that date and that the sinking funds will operate from that date. The $19,166,786 represents the plan requirements from January 1, 1944 to June 1, 1946 for the new bonds and preferred stock only, omitting any provision for dividends on the new common stock. If such dividends at the rate of $3.50 per share per annum were added, it would more than use up the available cash of $10,997,108.

The $10,997,108 of net cash, if not used for dividends on the new common stock from January 1, 1944 to June 1, 1946, would have to be used for (1) additions and improvements, (2) debt retirement, or (3) for other corporate purposes. For the period since January 1, 1944, the creditors have received no interest whatever.* For

* The cash distribution of $38,011,922 is applicable under the plan in reduction of their claims as of January 1, 1944 (257 I. C. C. 307, 318). Between 1934 and 1945, the creditors received no interest, so that the payment of this cash distribution in 1945, if all applied to interest accrued to January 1, 1944, would still leave a balance of accrued and unpaid interest at January 1, 1944 of almost $100,000,000.

the period of two years and five months to June 1, 1946, they are entitled either (1) to receive interest on their bonds, which would amount to over $30,000,000 for two years and five months, or (2) to have the "net cash," which represents earnings accumulated since January 1, 1944, used for dividends on the new common stock or for one of the other purposes just mentioned and to obtain the benefit of either the distribution of dividends or the increase in the value of their equity (represented by the new common stock allotted to the creditors under the plan of reorganization) which would result from the making of additions and improvements, from debt retirement, or from the accumulation of the earnings for other corporate purposes.

The clear and fundamental error in the District Court's brief reference to this subject—an error which was aggravated by the Court's erroneous assumption that anything like $70,000,000 could be paid out for any purpose (R. 252-3)—was pointed out by this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company* (1946), 328 U. S. 495, 521:

> "The effective date of the plan was fixed by the Commission as January 1, 1943. This was in its power. The allocation of the securities took into consideration the interests of the secured claims to that date. Any gain or any loss after that time was a benefit or an injury to the new common stockholders and then sometimes to security holders in positions senior to them."

The right to any gain after the effective date of a plan necessarily carries with it the right to any cash which might be accumulated. On this subject this Court said (p. 518-519):

> "There is another important factor, corollary to stock ownership, to be noted in the Commission's allocation of these securities. This factor is that the

> creditors who received common stock to make them whole obtained with that common stock an interest in all cash on hand or all cash that might be accumulated. Of course, the Commission thoroughly understood this."

In the light of these factors this Court discussed the accumulation of cash in the *Denver* estate under the heading *"Cash and War Earnings"* (p. 520-524). In the interests of brevity we will not quote the entire discussion; the essence is in the concluding paragraph (p. 523-524):

> "The error of the Circuit Court in its holding set out above lies in its assumption that the senior bondholders were paid in full by the securities allotted to them without also accepting the determination of the Commission that the assets represented as of January 1, 1943, and all subsequent earnings were a part also of the common stock that was awarded the senior bondholders."

The cash situation in the present case was fully and accurately discussed in the opinion of the Circuit Court of Appeals (R. 336-337).

(4) Payment of the Claim of the R. F. C.

The District Court's opinion next says that (R. 252):

> "an R. F. C. loan aggregating, principal and interest, in excess of $18,000,000 (had been) paid in full".

The claim of the R. F. C. was paid May 15, 1945 before the District Court entered its order of June 14, 1945 approving the plan (R. 244; 67 F. Supp. 547). The payment consequently preceded, and it was discussed in, the opinion of the Circuit Court of Appeals affirming the approval of the plan (157 F. (2d) 241, 247 footnote 1). And by a still longer period it preceded this Court's

denials of certiorari to review the order of the Circuit Court of Appeals.

In the District Court's opinion approving the plan the District Court advanced sound reasons why the payment of the claim of the R. F. C. did not require the disapproval of the plan (67 F. Supp. 547, 553). Those reasons were substantially similar to the reasons which this Court later gave in its opinion in *Reconstruction Finance Corporation* v. *Denver & Rio Grande* (1946), 328 U. S. 495, 525, as to why a reduction of senior debt does not require a new plan:

> "When the reduction of senior capital takes place after the adoption of the plan by use of anticipated earnings or existing cash, there can be no such readjustments of junior participation because assets in the balance sheet at the adoption of the plan and subsequent earnings are, as we have pointed out, for the benefit of the stockholders in the new company so that through these common stock advantages these new stockholders may be compensated for their loss of payment in full in cash."

The payment of the claim of the R. F. C., like all other points mentioned by the District Court, was fully discussed in the opinion of the Circuit Court of Appeals (R. 337-338).

(5) Payment of the Peoria Terminal Company First Mortgage; Retirement of Part of the Choctaw & Memphis First Mortgage Bonds; and Retirement of the Joliet and Denver Terminal Bonds.

The District Court said that (R. 252):

> "the entire first mortgage of the Peoria Terminal Co. (has been) to all intents and purposes paid in full";

and that

> "over 20% of the Choctaw & Memphis first mortgage (have been) retired".

It also mentioned:

> "the retirement of debt on jointly owned facilities such as the Joliet and Denver Terminals".

The "entire first mortgage" of the Peoria Terminal Company is only $928,000; 20% of the Choctaw & Memphis First Mortgage Bonds would be $704,800 (257 I. C. C. 307, 318); and the cost of retiring the debt of the Joliet and Denver facilities is $824,000. The total of the three items is $2,456,800.

The amount is insignificant in relation to the deficiencies in the claims of those mortgage bond creditors whose claims will not be satisfied under the plan or in relation to the accruals of interest between January 1, 1944, and June 1, 1946, amounting to more than $30,000,000, which would have to be provided for if the plan were remanded to the Commission. The principle involved is exactly the same as that presented by the payment of the claim of the R. F. C.

These minor items of debt reduction were all discussed in the opinion of the Circuit Court of Appeals (R. 337-338).

(6) Reduction in Equipment Debt.

The Court next mentioned (R. 252):

> "an amazing reduction, in the interim, of equipment debt".

It did not say what the reduction was or what it meant by "the interim".

The facts with respect to the equipment debt illustrate how far Judge Igoe went in considering changes in conditions which took place *prior to the approval of the plan.*

On January 1, 1944 the equipment debt was $11,909,000 (257 I. C. C. 307, 318) and on April 30, 1946, the latest date shown in the record, it was $10,058,430 (R. 245). There is,

of course, nothing "amazing" about such a reduction.

Judge IGOE unquestionably referred to the very much larger reduction (from $26,571,639 to $10,058,430) which, as shown in one of the appellee's exhibits (R. 245), took place between December 31, 1939 and April 30, 1946, and most of which took place prior to the extensive discussions of the subject of the reduction of the equipment obligations in the Commission's reports of January 3, 1944 and May 1, 1944, in the District Court's opinion of June 15, 1945,* in the briefs on the appeals relating to the approval of the plan and in the opinion of May 23, 1946 of the Circuit Court of Appeals.

(7) Elimination of Classes of Creditors.

The Court next said (R. 252):

> "Three classes of creditors set up in the original Plan have disappeared—the banks, the R. F. C., and the Peoria Railway Terminal Co."

Obviously, it adds nothing to say that classes of creditors have disappeared if their claims have been paid.

The reason why the claims of the banks have disappeared is that the injunction against the sale of their collateral was lifted (R. 247-8) and the collateral (in substantially larger face amount than the amount of the bank loans) was sold, so that in their shoes there now stand the holders of the First and Refunding Mortgage Bonds and the St. Paul & Kansas City Short Line First Mortgage Bonds, who bought them from the banks. The transfer of these pledged bonds to the present public holders obviously affords no basis for more favorable treatment of the holders of the Convertible Bonds.

---

* In this opinion of the District Court approving the present plan of reorganization, the Court had discussed at length the contentions of the petitioners with respect to the effect of the reduction of equipment trust obligations by $13,000,000 between January 1, 1942 and January 1, 1944, and ruled against those contentions.

(8) Expenditures for Improvements.

The Court next referred to (R. 252)

> "the tremendous sums expended over the period on improvement of road and equipment".

The Court did not say what the sums were or over what period they had been expended.

This is another subject specifically covered by this Court's opinion *in Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company* (1946), 328 U. S. 495, 514-515:

> "Earnings during the trusteeship were used to improve the debtor railroad. When the vote was taken in 1944, the real estate and equipment account showed charges of $43,291,513 during the trusteeship. An estimated ten million of it was between the Commission's approval of the plan, June, 1943, and the Commission's certification on July 15, 1944, to the court of the vote by claimants. See 254 Inters Com Rep (F) at 354 and 382 for explanation of new equipment program to meet the war situation. The retirements are said by the respondent trustee to have been about $13,000,000, leaving a net addition to capital account of $30,000,000. Respondents urge that since capitalization was not substantially increased by the Commission between 1938, when the first draft of a plan came from the Commission's staff, and 1943, the junior creditors got little or nothing for this investment. The improvements may have been wise or unwise. That question is not before us. Railroads even in reorganizations must make additions to take care of public needs or to lower operating costs. See 62 F Supp 389. The senior bond interest continued to accumulate during this period. As the capitalization was not increased pari passu with the purchases, the holders of junior securities received less participation. The Commission did not consider that the earning prospect justified a greater capitalization than the one

given and we think its judgment controls the valuation."

• • • •

It is fair to say, therefore, that under this Court's rulings in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Railroad Co.* (1946), 328 U. S. 495, there was no evidence to support the failure to confirm the plan. On the contrary, every ground urged by any of the objectors to the plan or mentioned by Judge IGOE in his opinion was specifically and clearly covered by an explicit ruling in this Court's opinion in the *Denver & Rio Grande* case. Therefore the following statement by this Court in the *Denver* case is just as applicable in the present case (328 U. S. at p. 535):

> "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection. If only those elements are relied upon, as here, the rejection is not reasonably justified."

It can also be said that every point was considered by the Circuit Court of Appeals in its opinion and disposed of in conformity with the rules so laid down by this Court (R. 332-333, 343).

IV.

THE PLAN IS NOT INEQUITABLE TO THE HOLDERS OF THE JUNIOR SECURITIES.

On the argument in *Insurance Group Committee* v. *Denver & R. G. W. R. Co.* (1947), 329 U. S. 811, tables of market prices of "when issued" securities were submitted to the Court to show that the market values of the securities distributable under the plan to the secured creditors were much less than the amounts of their claims.

A similar table was submitted in the present case on the argument of the appeals in the Circuit Court of Appeals on January 30, 1947, as follows:

"Table of Market Prices of 'When Issued' Securities Allotted Under the Plan to Secured Creditors.

Issue	Amt. of Claim Jan. 1, 1947*	Market Price of Allotment of 'When Issued' Securities Jan. 22, 1947**	Percentage of Claim Satisfied by Allotment†.
Gen. Mtge. Bonds...	$1331	$923	69
First & Ref. Mtge. Bonds	1438	580	40
Sec. 4½% Bonds ...	1496	653	44
C. O. & G. Bonds ...	1509	906	60
St. P. & K. C. S. L. Bonds	1538	489	32
R. I. A. L. Bonds ...	1504	622	41
B. C. R. & N. Bonds	1631	397	24
L. R. & H. S. W. Bonds	504	364	72

* The amount of each claim as of January 1, 1947 is calculated from Exhibit A at the front of the Commission's submission pamphlet which is R-35 on appeals Nos. 9247, 9270, 9271, 9272. In each instance the cash distribution made in October 1945 has been treated as applied in reduction of accrued interest and interest from January 1, 1944 to January 1, 1947 has been added. In the case of the Little Rock & Hot Springs Western First Mortgage Bonds the principal amount of the claim has been treated as $397.90. (See Exhibit A, R-10, and also R-10, p. 259.)

** The allotments of new securities are set forth in Exhibit A at the front of the Commission's pamphlet referred to in the preceding footnote. The market prices are taken from the Wall Street Journal of January 23, 1947 and represent the average of the bid and asked prices. They are as follows:

First Mortgage Bonds	105
Income Bonds	85½
Preferred Stock	64½
Common Stock	28½

† The figures in this column somewhat overstate the extent to which the claims are to be paid on the basis of current 'when issued' prices. A purchaser of 'when issued' income bonds, preferred stock and common stock would not have to pay the seller for them until the plan was consummated and those securities were delivered to the purchaser; when the securities were delivered, the purchaser would receive interest on the income bonds from January 1, 1944 and dividends on the preferred stock from the same date and any dividends payable on the common stock; and the purchaser would not have to pay any interest on the purchase price of the securities from the date of the contract or purchase to the date of delivery. Since interest has been computed only to January 1, 1947 in the above table, the effect of the table is to omit any provision for interest from January 1, 1947 to the date of the consummation of the plan on so much of the claims as would be provided for in income bonds, preferred stock and common stock. A purchaser would have to pay interest on the new first mortgage bonds from January 1, 1944 to the date of delivery of the bonds."

The present "when issued" prices for the new securities (Wall Street Journal of August 5, 1947) are below those of January 23, 1947.

Testimony with respect to the probable maximum future prices of the securities allotted to the holders of the General Mortgage Bonds was given at the hearing before the Interstate Commerce Commission in September, 1943, with a view to establishing that the allotment was inadequate (257 I. C. C. 265, 278). No testimony has ever been given that there is any likelihood that the holders of those Bonds or of any other class of bonds will receive under the plan securities on which they can hope to realize in the foreseeable future an amount in excess of their claims. There were three opportunities to give such testimony: before the Interstate Commerce Commission, at the Court hearing on the approval of the plan, and at the hearing on the confirmation of the plan. No effort was made to show that the plan could actually operate to enrich the secured creditors.

V.

THE DISTRICT COURT DID NOT HAVE UNREVIEWABLE "DISCRETIONARY" POWER TO REFUSE TO CONFIRM THE PLAN.

The only distinction—not a real difference—between this case and *Reconstruction Finance Corporation* v. *Denver & Rio Grande Railroad Co.* (1946), 328 U. S. 495, is that the District Court confirmed the *Denver & Rio Grande* plan and was reversed by the Circuit Court of Appeals, whereas the District Court refused to confirm the Rock Island plan and was directed to do so by the Circuit Court of Appeals.

A principal argument in the Court below, and *the* principal argument made by the petitioners, is that under Sec-

tion 77(e) the District Court had what is called a "discretionary" power to confirm the plan or to remand it to the Interstate Commerce Commission.

A District Judge who administers a case has no personal prerogative to determine the fate of a plan of reorganization which the Commission has approved. Both the public and the security holders are entitled to a judicial decision on the law and the record. If the District Court's power may be said to be "discretionary" in any sense, it calls for the exercise of a "judicial" discretion circumscribed by the rules laid down by this Court in its opinion in the *Denver* case.

The petitioners attempt to discard this Court's interpretation of the pertinent provisions of subsection (e) of Section 77 and rely upon single words in the statute which reads:

> "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection. * * * *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan, conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (3). * * * If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his

> discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings including the consideration of modifications of the plan or the proposal new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder."

Several of the petitioners emphasize that the proviso just quoted—to which they refer as the "cram-down" provision in the hope that that name will make it seem extraordinary and unpalatable—uses the word "satisfied." They argue that, since a District Judge must be "satisfied" in order to confirm a plan, he should refuse to confirm a plan if he has any doubt whatever on any issue before him. But the same word "satisfied" is used in the provision of subsection (e) pertaining to the initial approval of a plan by a Judge. This Court's opinions in the *Western Pacific* and *Milwaukee* cases establish that when a District Court is asked to approve a plan which has been approved by the Commission, it should give the benefit of any doubt to the Commission-approved plan. And the *Denver* opinion shows that the same rule applies when an application is made for confirmation.

Another word relied upon by the petitioners is "may", as contrasted with the word "shall" in the provision of subsection (e) relating to the approval of a plan. It is perfectly clear from this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946), 328 U. S. 495, that no significance can be attributed to the use of the word "may" rather than the word "shall". In the *Denver* opinion this Court laid down the rules which govern when an application for confirmation is made after the rejection of a plan by one or more classes of securityholders. If those rules govern, it makes no difference whether the statute uses the word

"may" or the word "shall" and it does not add anything to refer to the Court's power as "discretionary".

Certain of the petitioners imply that the sentence which prescribes when the Judge shall confirm a plan uses the word "discretion." It does not. The word "discretion" is used only in the sentence which says what a Judge may do *after* he has decided not to confirm a plan. There is thus no statutory provision that the Judge shall have "discretion" whether or not to confirm a plan. If anything, the use of the word "discretion" in the statutory provision relating to what shall be done *after* the Judge has decided not to confirm a plan would indicate that the Judge does not have a "discretion" whether to confirm a plan or not.

At any rate, application of the principles laid down by this Court in the *Denver* case to the facts in the record of the present proceeding demonstrates that the refusal to confirm was without warrant or rational basis and would therefore be an abuse of any discretion vested in the District Court.

The petitioners' principal reliance is on the circumstance that in the *Denver* case the District Court confirmed the plan and that in reinstating the District Court's decision this Court spoke of the "District Judge's familiarity with the reorganization." *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946), 328 U. S. 495, 533.

Certainly if a District Judge decides the issues relating to either the approval or the confirmation of a plan of reorganization and it appears that his decision results from an application of the law to the facts in the record, any appellate court may be expected to consider his "familiarity with the reorganization" as a factor in determining whether or not to sustain his decision. "Familiarity with the reorganization" may be an important

aid in reaching a correct decision of the issues in a reorganization proceeding.

But the fundamental requirement is a realization that the issues in a reorganization should be decided in conformity with the law. If that fundamental requirement is lacking, "familiarity with the reorganization" means nothing. In the present case, the District Court did not even purport to apply the applicable principles of the *Denver* case to the facts before it, but proceeded in a manner directly inconsistent with those principles. Also, in the present case, no matter involving any particular "familiarity with the reorganization" was involved. The only issue before the District Court on the confirmation was whether there had been such a change of conditions since the approval of the plan that the plan which was "fair and equitable" when approved was no longer "fair and equitable." The facts were clear that there had been no such change of conditions in that period of one year and the District Court cited none.

The petitioners' arguments could not in any event survive an analysis of the provision of subsection (e) of Section 77 which reads:

> "*If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor,* and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans."

This provision does not call for mere findings such as the District Court incorporated in the order appealed from (R. 241-242). Findings of that character are referred to in the statute as "conclusions". The statute also calls

expressly for a statement of the District Court's "reasons" for his failure to confirm the plan.

Clearly one purpose of the requirement of subsection (e) of Section 77 that the District Court state its "reasons" for its decision was in order to permit an adequate review of the decision. This requirement of Section 77 for a statement of "reasons" for refusal to confirm, is not unique. Under subsection (e), if the judge "shall not approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor". So also under the same subsection, if "the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor". One obvious purpose in each instance was to have adequate statements of the "reasons" for the Court's actions in order to permit a proper review.

It would be the height of absurdity to say that, when the statute requires a statement of "reasons" to support "conclusions," a statement of "reasons" which does not afford the slightest legal basis for the "conclusions" can sustain an order which purports to rest on such "conclusions."

VI.

THE CIRCUIT COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER AND HAD POWER TO DIRECT THAT THE PLAN BE CONFIRMED.

The Preferred Stock Committee and Axelrod *et al.* contend that the Circuit Court of Appeals had no jurisdiction to review the District Court's refusal to confirm the Plan. The Debtor in its petition does not advance that contention.

Section 24(a) of the Bankruptcy Act (11 U. S. C., Sec. 47 (a)) expressly vested the Circuit Court of Appeals with appellate jurisdiction

> "in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact; * * *."

That statute, as the Circuit Court of Appeals necessarily held, gave it jurisdiction to hear the appeals from the order denying confirmation entered in a proceeding under Section 77 of the Bankruptcy Act.

However, the Preferred Stock Committee makes the contention (pp. 13-15) that Section 77(f) of the Bankruptcy Act evidences an intention that no appeal be allowed in Section 77 proceedings except from an order confirming a plan. Its argument is built on the provision of Section 77(f) that, upon confirmation, the plan shall be binding "subject to the right of judicial review." The claim is that the quoted words are a grant of a right to appeal from a confirmation order, and that such a grant would impliedly preclude appellate review of any other Section 77 order of the District Court. The argument is wholly fallacious.

In the first place, the express grant of appellate jurisdiction contained in Section 24(a) of the Bankruptcy Act could not be nullified in other provisons of the Bankruptcy Act except by language clearly inconsistent with Section 24(a). There is no inconsistency between Section 24(a) and the above quoted language in Section 77(f). Furthermore, Section 77(f) is not the grant of a right to appeal from confirmation, as the Preferred Stock Committee contends. The words "subject to the right of judicial review" would hardly be used as an affirmative grant of a right to appeal. These words are a mere statement of a condition as to the binding effect of an order of confirmation. This condition necessarily had to be inserted in the provision which makes the confirmation order as final and binding as possible. But the right of review referred to in the

condition is necessarily that granted by Section 24(a) relating to bankruptcy proceedings in general.

If the Preferred Stock Committee's contention were sound, then the Circuit Courts of Appeals would not have had jurisdiction in all the many cases in which they have reviewed Section 77 orders other than confirmation orders. In fact the Circuit Court of Appeals below would not have had jurisdiction of the appeals which the petitioners themselves took in 1946 from the District Court's order approving the reorganization plan.

Then the Preferred Stock Committee (p. 15) cites *Gilbert* v. *Securities and Exchange Commission,* 146 F. 2d 513 (C. C. A. 7, 1945) as inconsistent with the Circuit Court of Appeals having had jurisdiction in the present case. The *Gilbert* case is not in point. The appeal there was taken under the Public Utility Holding Company Act and not the Bankruptcy Act. The appeal was from an order of the Securities and Exchange Commission recommending a reorganization plan to the District Court. The Circuit Court of Appeals merely held that the District Court should first act on the recommended plan before the matter came to the Circuit Court of Appeals.

The Preferred Stock Committee also makes the rather frivolous contention that the rights of the appealing creditors were not affected by the order refusing to confirm and that they therefore had no right to appeal from the order denying confirmation. The lack of substance in that contention is demonstrated by the fact that this Court took jurisdiction in the *Denver and Rio Grande Western* case, 328 U. S. 495, of an appeal by creditors from a Circuit Court of Appeals order reversing an order of confirmation and remanding the proceeding to the Interstate Commerce Commission. On this point the Preferred Stock Committee (p. 21) cites *Knight* v. *Wertheim & Co.* (C. C. A. 2, 1946), 158 F. 2d 838. But that case did not involve the ques-

tion of a right to appeal. The question there was as to the effect of an alteration of a plan which would give creditors payment in cash in full. The Circuit Court of Appeals held that the creditors would not be adversely affected by such an alteration. Such a holding can have no possible bearing in the present situation.

Axelrod *et al.* also argues (p. 4) that review by the Circuit Court of Appeals was a denial of "due process," but such an argument needs no comment.

The contention is made by the Preferred Stock Committee and Axelrod *et al.* that even if the Circuit Court of Appeals had jurisdiction, it did not have power to direct the District Court to confirm. The contention has no substance. It is clear that on an appeal in bankruptcy the Circuit Court of Appeals has jurisdiction to determine the merits of the case.

Bankruptcy Act, Section 24(a), 11 U. S. C., Sec. 47(a);
Schieber v. *Hamre* (C. C. A. 8, 1926), 10 F. (2d) 119;
In re Marshall (C. C. A. 2, 1931), 47 F. (2d) 209;
In re Gustav Schaefer Co. (C. C. A. 6, 1939), 103 F. (2d) 237.

As already mentioned, Section 24(a) of the Bankruptcy Act gives the Appellate Court in bankruptcy proceedings the power "to review, affirm, revise or reverse, both in matters of law and in matters of fact".

In *In Re Gustav Schaefer Co., supra,* the Court said (p. 242):

> "Upon an appeal in equity or bankruptcy, the appellate court will dispose of the case if the entire record is before it. Elliott v. Toeppner, 187 U. S. 327, 333, 23 S. Ct. 133, 47 L. Ed. 200; Houghton v. Burden, 228 U. S. 161, 172, 33 S. Ct. 491, 57 L. Ed. 780; Courier-Journal Job-Printing Company v.

> Schaefer-Meyer Brewing Company, 6 Cir., 101 F. 699; Schieber v. Hamre, 8 Cir., 10 F. 2d 119. The record here is complete and we may make final disposition rather than remand for further hearing."

As already stated, the entire court day of January 30, 1947 was devoted to the argument of the two groups of Rock Island appeals heard that day. Much the greatest part of the day was devoted to the appeals relating to the confirmation of the plan. The opinion of the Circuit Court of Appeals is the best answer to any criticisms of the adequacy of that Court's consideration of the questions argued before it (R. 332-343).

VII.

PETITIONERS HAVE NO SUBSTANTIAL INTEREST IN THE CASE.

The Circuit Court of Appeals permitted all of the petitioners to file briefs and argue on both the appeals relating to the approval of the plan and the appeals relating to its confirmation. On the appeals relating to the approval, the Court said (157 F. (2d) 241, 245):

> "The debtor seeks nothing for itself. It is in the anomalous but commendable position of arguing for others. The debtor, appropriately, does not question the valuations of the Commission."

Similarly, in the two *Denver & Rio Grande* cases, this Court permitted the Debtor to be heard.

However, the Debtor is actually the spokesman for the stockholders and the Preferred Stock Committee is a spokesman for some of the stockholders. The approval of the plan by the District Court, the affirmance of that approval by the Circuit Court of Appeals, and this Court's denial of the petition for writs of certiorari establish that the stockholders have no right to participate in the plan and it was not submitted to them for acceptance or rejec-

tion. On the motion for confirmation, the only issue was whether the classes of creditors who had not voted to accept the plan were reasonably justified in failing to accept. In these circumstances, the confirmation proceedings did not affect the old stockholders, and neither the Debtor nor the Preferred Stock Committee had any standing to object to confirmation of the plan after its submission to creditors or to seek review in this Court of the order directing confirmation. In the *Denver* case, 328 U. S. at page 520, this Court ruled that a stockholder had no standing to object to a provision of the plan only affecting creditors since the stockholder was eliminated under the reorganization plan. This Court said (p. 520):

> "It would also follow that the objection of a stockholder, the Missouri Pacific Railroad Company, through its Trustee in reorganization, to a voting trust for future control of the debtor would be ineffective because this stockholder is eliminated from the reorganization by the valuation of the property and allocation of securities."

Gerald Axelrod *et al.* call themselves "The Convertible Bondholders Group." They say that they are the "sole spokesmen" for the $32,228,000 of Convertible Bonds (p. 2). They have no authority to speak except for the bonds which they own. They do not state how many they own. When last disclosed the amount was comparatively inconsequential. The Trustee named in the Indenture under which the Convertible Bonds were issued, The Chase National Bank of the City of New York, was represented at the hearing in the District Court, and its counsel argued on behalf of the Convertible Bonds Trustee in the Circuit Court of Appeals.

If the plan were unfair or inequitable, the circumstance that Gerald Axelrod, *et al.* own but a small fraction of the most junior bond issue of the Rock Island

System would not have any legal significance. *Case* v. *Los Angeles Lumber Products Co.* (1939), 308 U. S. 106, 114-115. However, this Court will not be unmindful that the very large number of bondholders who voted to accept the Commission's plan (94.89% to 98.17% of the secured creditors in each class who voted, except one very small mortgage bond issue which has not objected to confirmation) would be injured by any unnecessary delay in concluding a reorganization proceeding which has already been pending for over fourteen years.

CONCLUSION.

This Section 77 reorganization proceeding has been pending since 1933. In 1944 the Commission certified to the Court the present modified plan of reorganization which the District Court approved in 1945. The Circuit Court of Appeals affirmed such approval in 1946 and this Court denied petitions for certiorari.

Within a few weeks after the Circuit Court of Appeals affirmed the approval of the plan, the District Court in June, 1946, refused to confirm the plan although, in the year which had elapsed since the District Court's approval of the plan, there clearly had been no change of conditions calling for revision of the plan. The District Court's action accordingly was in conflict with the principles laid down in this Court's opinions in the *Denver & Rio Grande Western* case. The District Court's refusal to confirm was reviewable by the Circuit Court of Appeals under Section 24(a) of the Bankruptcy Act, which grants it complete appellate jurisdiction of bankruptcy proceedings and controversies, whether interlocutory or final. No question is presented by petitioners warranting review by this Court of the action of the Circuit Court of Appeals in applying, to the facts of the present case, the principles laid down by this Court in the *Denver & Rio Grande Western* case.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITIONS FOR CERTIORARI SHOULD BE DENIED.

EDWARD W. BOURNE,
of Counsel.

ALEXANDER & GREEN,
120 Broadway,
New York 5, N. Y.

FRANK H. TOWNER,
of Counsel.

WINSTON, STRAWN & SHAW,
First National Bank Building,
Chicago, Illinois.

Attorneys for Protective Committee for The Chicago, Rock Island and Pacific Railway Company General Mortgage Bonds due January 1, 1988.

JESSE E. WAID,
of Counsel.

WHITE & CASE,
14 Wall Street,
New York 5, N. Y.

FRANK H. TOWNER,
of Counsel.

WINSTON, STRAWN & SHAW,
First National Bank Building,
Chicago, Illinois.

Attorneys for Bankers Trust Company and R. G. Page, as Trustees of the General Gold Bond Mortgage of The Chicago, Rock Island and Pacific Railway Company, dated January 1, 1898.

WILKIE BUSHBY,
JOSEPH SCHREIBER,
of Counsel.

ROOT, BALLANTINE, HARLAN,
BUSHBY & PALMER,
31 Nassau Street,
New York 5, N. Y.

Attorneys for Metropolitan Life Insurance Company, as remaining member of the First and Refunding Group.

RATHBONE, PERRY, KELLEY & DRYE,
70 Broadway,
New York 4, N. Y.

ALEXANDER M. LEWIS,
of Counsel.

Attorneys for Central Hanover Bank and Trust Company and George S. Hovey, Trustees for First and Refunding Mortgage 4% Bonds of The Chicago, Rock Island and Pacific Railway Company.

SHEARMAN & STERLING & WRIGHT,
20 Exchange Place,
New York 5, N. Y.

SANFORD H. E. FREUND,
of Counsel.

Attorneys for The National City Bank of New York, Trustee for Secured 4½% Bonds, Series A, of The Chicago, Rock Island and Pacific Railway Company.

BEEKMAN & BOGUE,
15 Broad Street,
New York 5, N. Y.

EDWARD K. HANLON,
of Counsel.

Attorneys for Protective Committee for the Holders of First Mortgage 4½% Bonds of The Rock Island, Arkansas and Louisiana Railroad Company.

CAHILL, GORDON, ZACHRY & REINDEL,
63 Wall Street,
New York 5, N. Y.

DANIEL JAMES,
of Counsel.

Attorneys for Protective Committee for Choctaw, Oklahoma and Gulf Railroad Company Consolidated Mortgage 5% Gold Bonds, and Choctaw and Memphis Railroad Company First Mortgage 5% Gold Bonds.

August 8, 1947.

INDEX.

Table of Cases.

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 184-9

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, *et al.*, as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, *et al.*, JOHN C. TRAPHAGEN, *et al.*, JAMES G. BLAINE, *et al.*,

Respondents.

MEMORANDUM OF RESPONDENTS AS TO SO-CALLED "REPLY BRIEF" OF THE DEBTOR.

On September 17, 1947 (over a month following the filing by respondents of their answer to Debtor's petition for certiorari), the respondents received a brief of the Debtor which it designates as a "Reply Brief" but which seeks to put before this Court new material, having no legitimate bearing on the merits of the present case, which

respondents have heretofore had no opportunity to discuss or answer. The "Reply Brief" also contains incorrect and fallacious statements with regard to such material. Respondents therefore submit this memorandum to refute the contentions made in the "Reply Brief".

1. The Debtor states erroneously (p. 6) that the Interstate Commerce Commission's recommendation that the Missouri Pacific plan be referred back to it was based on a "change of economic conditions" and that it indicated "the Commission's attitude toward present plans". The Commission's memorandum was not of general application but was expressly based on a unique combination of circumstances existing only in the Missouri Pacific case.

It is extraordinary for the Debtor to go outside the record of the present case and submit to this Court a memorandum of the Interstate Commerce Commission in another case which is based on the special facts of that case and which is expressly applicable only to those facts.

That the *Missouri Pacific* situation is unique is demonstrated by the fact that all parties appearing in that proceeding, long before the Commission filed its memorandum, had taken the position that the plan in that case (which had been approved by the District Court but not confirmed) should be remanded to the Interstate Commerce Commission, and the further fact that, when the proceeding recently came before the Circuit Court of Appeals for the Eighth Circuit on appeals from the approved plan, no party appeared in support of the plan but all the parties (appellees as well as appellants) requested the Court to remand the matter to the Commission. In contrast with this, all the secured creditors appearing before the Circuit Court of Appeals for the Seventh Circuit in the *Rock Island*

case joined in asking the Circuit Court of Appeals to direct confirmation of the plan, and only representatives of unsecured creditors and of the stock opposed confirmation of the plan.

The Commission's memorandum in the *Missouri Pacific* case (Appendix B to the Debtor's reply brief) shows that the recommendation therein made was largely based (a) on the enormous payments (not in amounts allotted in the Missouri Pacific plan) which had been made to Missouri Pacific creditors after the Commission's consideration of the plan, particularly when considered in the light of the provisions of the District Court orders under which the payments were made, and (b) on unusual provisions of the Missouri Pacific plan which do not appear in the Rock Island plan.

As to (a),—In the *Missouri Pacific* case a total of over $114,000,000 in principal and interest was distributed, after January 1, 1943 (the effective date of the Missouri Pacific plan), to Missouri Pacific creditors, and this included the retirement of more than $55,000,000 of Missouri Pacific senior debt. The District Court orders under which a substantial part of these obligations was retired provided that the Missouri Pacific Trustees should hold such obligations *for the benefit of the remaining creditors to the extent of their respective interests in the cash used for such retirement.* As a basis for recommending that the Missouri Pacific plan be remanded to it, the Commission expressly pointed out in its memorandum that it was doubtful that the Missouri Pacific plan contemplated that claims should be so acquired for the benefit of other classes of creditors, and further said:

> "The working out of a fair and equitable adjustment of the distribution of cash and securities will

> be a complicated matter. To attempt to do this within the framework of the present plan may result in substantial disturbance of the balanced relationship of the treatment provided for the various classes of creditors."

No such problem arises in the *Rock Island* case under the provisions of the Rock Island plan as applied to payments to creditors made in that case.

The only substantial claim of a Rock Island creditor which has been paid off since approval of the plan by the Interstate Commerce Commission is the claim of Reconstruction Finance Corporation in the amount of about $17,000,000. That claim was paid *before* approval of the plan by the District Court in June, 1945 and the vote of creditors; and in its opinion of May, 1945, expressing approval of the plan, the District Court emphatically ruled that the payment required no change in the plan but that, as provided in the plan, the securities allotted to Reconstruction Finance Corporation should not be redistributed but should be held in the Rock Island treasury. The District Court said (67 F. Supp., at p. 553):

> "The court considers the payment of the claim of the Reconstruction Finance Corporation, or the payment or purchase of other claims or bonds, if any be ordered, to be consistent with the plan and to afford no basis for any redistribution of securities which would involve a modification of the plan.***
>
> * * * * * *
>
> "The use of the money will not constitute a change in conditions calling for a modification of the plan. The money has accumulated, and there is no basis for saying that there is more in the estate than was expected when the Commission approved the plan. The use of the money to retire debt does not change the

situation any more materially than would the use of it for additions and betterments or the accumulation of it for future use."

The views of the District Court on this point were substantially similar to those later advanced by this Court in rejecting the contention that payments, under District Court orders, of certain claims in the *Denver & Rio Grande Western* reorganization proceeding required reconsideration of that plan by the Commission (328 U. S. 495).

The only other large cash payment to creditors in the Rock Island proceeding since approval of the plan by the Commission was the payment in 1945 of approximately $34,000,000 to the various creditors *in the precise amounts of the cash allotted in the plan* as approved by the Interstate Commerce Commission and the District Court. The Trustees of the Rock Island estate had advised the Interstate Commerce Commission that that amount would be available for distribution to creditors as of January 1, 1944; the Commission and the District Court had accordingly approved the plan allotting that amount of cash to the various creditors; and obviously distribution of that exact amount of available cash was not a change of conditions but, on the contrary, was expressly contemplated by the approved plan.*

No accounting proceedings with regard to redistribution of securities or cash are necessary in the *Rock Island* case under the terms of the Rock Island plan and of the District Court orders in that case, as compared with the further complicated proceedings which the Commission emphasized would be necessary in the *Missouri Pacific* case.

---

* Between $2,000,000 and $3,000,000 has also been distributed in the Rock Island proceeding to holders of terminal facility bonds and of Choctaw & Memphis Bonds. The position of these creditors was not disturbed by the plan so that such distribution represents no change in the dispositions made by the plan.

As to (b),—The Missouri Pacific plan also contained a series of unusual provisions, *not* present in the Rock Island plan, which the Commission said it wished further to consider.

The Missouri Pacific plan provided that senior creditors allotted new securities in the plan would have the right to elect to accept cash in compromise of their claims in amounts representing only a fraction of the claims. This percentage varied from 29% to 62%. These provisions were inserted in the plan in order to make new securities available for the most junior claimants. However, if these cash options were not eventually exercised by creditors, the new securities would not be available for those junior claimants without increasing the capitalization over the maximum amount permitted by the Commission. Accordingly, the plan provided that to the extent that creditors did not eventually elect to take the cash options, the reorganization managers should use the cash so made available to purchase new securities in the market with a maximum price for new General Mortgage Bonds of 62 and for new common stock of 26. In its memorandum, the Commission said that these cash option provisions should be reviewed to determine whether they are practicable under present conditions of the security market, and that various questions, which were not covered by the plan, should also be resolved with respect to the purchase by reorganization managers of new securities. There are no similar provisions in the Rock Island plan so that no such problem arises in the Rock Island proceeding.

In the light of the facts of the *Rock Island* case as contrasted with those of the *Missouri Pacific* case, we submit that it is clear that the Commission's recommendation in the Missouri Pacific proceeding has no bearing whatever in the Rock Island proceeding.

As shown in respondent's answering brief already on file (pp. 29-32), there is no excess cash in the Rock Island treasury, but all the cash in the treasury is needed for railroad purposes, including the servicing of the new securities issuable under the reorganization plan. The "available" cash would be used up if a dividend of only $3.50 per annum, for the period since the effective date, were paid on the new common stock issuable under the plan. Furthermore, since the end of hostilities, Rock Island earnings have not been more than enough to service the new securities currently, including a moderate dividend on the new common stock (See Point 3(b) below). In view of the above circumstances, there would be no basis whatever for the Commission's revising the Rock Island plan.* We submit that the Rock Island plan should be carried out just as the Denver & Rio Grande Western plan was carried out earlier this year, and as the New York, New Haven & Hartford plan has now been carried out. The consummation order in the latter case was entered by the District Court on September 11, 1947, this Court having denied applications for certiorari to review the New Haven plan on June 23, 1947 (67 S. Ct. 1754, 1755).

2. The memorandum of four members of Congress which is relied on by the Debtor has no bearing on the issues in this proceeding.

The Debtor attaches to its "Reply Brief", as Appendix A, a statement, dated August 1, 1947, by four Federal

---

* The District Court sent the plan back to the Commission with directions to revise it. The Commission, in its discretion, took no action pending appeal from the District Court order, which order was thereafter reversed by the Circuit Court of Appeals. There is nothing in the Commission's determination to await the outcome of the appeal which supports the Debtor's contentions in any way.

legislators supporting further delay in carrying out Section 77 reorganizations on the ground that new legislation may be enacted. The following statement of this Court in the *Denver & Rio Grande Western* case (328 U. S. 495, at pp. 509-12) would seem to be a complete answer to the effort further to prolong this fourteen-year-old reorganization for the purpose of awaiting possible legislation:

> "In examining the contentions of petitioners as to the alleged errors of the Circuit Court of Appeals, we must approach the problems in accordance with our reviewing authority under §77. That section embodies the method that Congress selected in 1933 and improved in 1935 to put the railroad transportation system of the country in order to meet its debts and perform its duties to the public after the hard years of the recent depression. Our constructions of the chief provisions of the section were handed down in March, 1943. Although the results of reorganizations under the section, as thus construed, have been criticized as unfortunate and changes have been suggested, no different legislation has been enacted. Indeed a different method for reorganization, enacted in 1939 and designed to meet the requirements of railroads not in need of financial reorganization of the character provided by §77 but only of an opportunity for voluntary adjustments with their creditors, terminated on July 31, 1940, and a comparable provision made in 1942 was allowed to lapse on November 1, 1945. This situation leaves clear the duty of the agencies of the Government entrusted with the handling of reorganizations under §77, including this Court, to administer its provisions according to their best understanding of the purposes of Congress as expressed in the words of §77 read in the light of the contemporaneous discussion in Congress. Changes in economic conditions cannot affect the powers of the reorganization

> agencies even though such changes may require a reexamination into the present fairness of the former exercise of those powers." [Footnotes omitted.]

It would seem that the following statement in the Debtor's "reply brief" (p. 5) is also directly inconsistent with its contention:

> "It is obvious that the courts cannot wait for possible legislative changes in reorganization proceedings any more than in other types of cases."

Proposals for amendment of Section 77 have been put forward since 1943, and a number of such proposals are referred to in the footnotes to the above extract from this Court's opinion in the *Denver & Rio Grande Western* case. For several years efforts have been continuously made to delay Section 77 reorganizations on account of the possibility of legislation amending or superseding Section 77. We submit that the present state of affairs is that there already has been too much delay rather than that further delay is warranted.

Furthermore, there is a pronounced difference of opinion in Congress with respect to this proposed legislation. There were vigorous dissenting reports in the legislative committees.

The dissent in the Senate Committee on Interstate and Foreign Commerce, joined in by six Senators, severely condemned the proposed legislation (Report 432, Part 2, to accompany S. 249, 80th Congress, 1st Session).

The dissent in the House Judiciary Committee was signed by eleven members of the Committee and concluded as follows (Report 923, Part 2, to accompany H. R. 3980, 80th Congress, 1st Session, p. 8):

> "The enactment of this bill would be so harmful to the public interest, so injurious to railroad credit,

and so inequitable in its results that the Congress should reject it."

The Interstate Commerce Commission has also placed itself on record as strongly opposed to the proposed legislation. In a letter, dated May 12, 1947, to the Chairman of the Sub-Committee on Bankruptcy and Reorganization of the House of Representatives (Hearings on H. R. 3237, 80th Cong., 1st Session, Serial No. 6, pp. 168-180), the legislative committee of the Commission (composed of members of the Commission) stated the reasons why the Commission thought the legislation should not be enacted, and summarized its objections as follows:

"It is our view that H. R. 3237, because of the provisions of section 2, will not accomplish its purposes and is fundamentally unsound for the following reasons:

"1. It discards some plans of reorganization carefully worked out over a number of years by creditors of the railroads, approved with certain modifications by the Commission and the district courts after painstaking study and thorough consideration, accepted by more than two-thirds in amount of the total claims found to be entitled to participate in the reorganization, confirmed by the district courts, and now ready for the final steps required to complete reorganization.

"2. It suspends and discontinues the proceedings under section 77, leaves the properties in the custody of the courts, removes the trustees, and puts the debtors in possession of the properties, regardless of whether under any reasonable test the debtors have any equities in the properties.

"3. The provisions of section 1 were intended for application to solvent railroads and are unsuited

and inadequate for working out plans of adjustment for railroads in process of reorganization under section 77.

"4. It would impede rather than hasten readjustment of capital structures, would suspend indefinitely the rights of creditors, and would result in great waste of time, effort, and money.

"5. It would, in adjustments made pursuant thereto, require sacrifices on the part of creditors for the benefit of stockholders without any sacrifice on the part of stockholders, and continue in effect, contrary to the public interest, capital structures which cannot survive in a period of decreasing earnings and increasing costs.

"6. It would damage rather than restore credit of the railroads of the country as a whole.

"7. It is unworkable.

"8. It is unnecessary since any inequities resulting from the provisions of section 77 of the Bankruptcy Act can be remedied by a simple amendment of that section."

The statement of the four legislators regarding the "injustice and inequity of rushing the innocent security-holders of these railroads 'to the guillotine'" wholly ignores the fact shown by testimony before the legislative Committees that 80% to 90% (or more) of the stock owned at the commencement of the Rock Island bankruptcy proceeding in 1933 has since been sold at nominal prices to speculators (Hearings on H. R. 3237, 80th Cong., 1st Session, Serial No. 6, pp. 153-4; Minority Report, No. 923, Part 2, to accompany H. R. 3980, 80th Congress, 1st Session, p. 3). During this whole period, these stocks have been selling at nominal prices. As to the persons who bought stock of a bankrupt railroad at nominal prices and

then proceeded to press for legislation which they could turn to their profit, it would hardly seem that they are entitled to protection of their speculative investment at the expense of holders of mortgage bonds which have been in default for 14 years.

Furthermore, it is simply impossible to legislate value into a situation where the value does not exist. About $140,000,000 of unpaid accrued interest has accumulated in the Rock Island bankruptcy since the original defaults in 1933, and this must be given recognition ahead of the stock. Even the District Court's opinion on which the Debtor relies had this to say (R. 253):

> "The Commission cannot throw to the winds all consideration of future earnings, nor can it perform miracles. The war revenues are past, higher costs of labor and materials, and many other new problems beset railroad management. With the most optimistic approach by the Commission it would be vain for the junior creditors to expect to be made whole."

If the junior creditors could not expect to be made whole, it is inevitable that nothing remains for the old stock.

3. There are additional incorrect and fallacious statements in the Debtor's "reply brief".

(a) The Debtor says (p. 2) that the plan was rejected by "two important classes of creditors".

The fact is that all the secured creditors overwhelmingly voted to accept the plan except one small mortgage on 22 miles of line which was held by the Commission to have a claim against the Rock Island system in the principal amount of only $453,600. Representatives of that issue did not oppose confirmation of the plan.

The unsecured Convertible Bondholders were the only other class rejecting the plan, and they necessarily had only a meager claim. Under the plan, secured creditors have a total deficiency not recognized in any new securities of $106,000,000. It follows that little was left for the unsecured creditors and that they were therefore dissatisfied with their allotment of approximately 5 shares of new common stock and $12.42 in cash for each $1,000 bond. But creditors in a similar position in the *Denver & Rio Grande Western* case were likewise dissatisfied and voted against the plan which, nevertheless, was confirmed and carried out.

(b) The Debtor is incorrect when it says (p. 2) that the District Court found the rejection justified because of "a large and unanticipated increase in the earnings of the debtor *after the plan had been approved*" (italics in original).

The District Court made no such statement either in its opinion or in its order (R. 249-255). It could have made no such statement in view of the fact that the trend of earnings has been steadily downward for each calendar year since the plan was approved by the Commission. In 1943, before the modified plan was approved by the Commission, the earnings before interest were $37,037,708,—whereas for the year 1944, during which the modified plan was approved by the Commission, the earnings declined to $26,415,919. During 1945, when the plan was approved by the District Court, the earnings declined further to $20,444,571; and thereafter in 1946 the earnings declined again to $16,578,161.

The Debtor quotes (p. 3) from the *Denver & Rio Grande Western* decision of this Court to the effect that rejection of a plan might be justified if unanticipated, large earnings developed after approval of the plan. But in the

Rock Island case earnings were much lower in 1946 when the creditors voted on the plan than they were in 1944 and 1945 when the plan was approved, and therefore the *Denver & Rio Grande Western* decision is squarely opposed to the Debtor's contention.

The current earnings of the Rock Island are moderate in relation to the new capitalization provided in the plan. The $16,578,161 of earnings available for interest in 1946, if applied to the capital structure set up in the plan, would leave a balance after dividends on the new preferred stock of about $7,500,000 or roughly $5 per share on the new common stock. Even if this total amount were paid out as a dividend on the new common stock (which most Rock Island creditors must take at $100 a share or more), it could hardly be considered as an unduly large annual dividend. And the fact, of course, is that neither the Rock Island nor any other railroad would pay out every last cent of available earnings as dividends on the common stock, but, in the normal course, would pay out only a percentage of such earnings. Earnings such as those of 1946, which produce from $2.50 to $5 a share as dividends on the new common stock, can surely not be considered as unexpectedly large. If some earnings had not been expected for the new common stock which is allotted to creditors for their claims, the Commission would not have included it in the new capitalization. In the light of these earnings, the new common stock is selling on a "when issued" basis at only about 26.

(c) The Debtor's brief says (p. 3) that the Commission based the plan on an earnings estimate of $11,000,000 and that current earnings are higher than this.

The Commission's reports and published schedules show that the amount of $11,000,000 was used only in determining the amount of new income bonds to be issued

in the reorganization. In addition to the new bonds, the Commission provided for $75,000,000 of new preferred stock and for $150,000,000 of new common stock (taking each share at $100). The $75,000,000 of preferred stock was allocated among creditors on an assumed earnings level of about $17,000,000 (252 I. C. C., at p. 499, line 1, col. 21).

On an earnings level of $11,000,000, no earnings or dividends would be available for the enormous new issue of common stock provided by the Commission, and obviously the Commission believed that there was reasonable assurance that there would be earnings and dividends for the common stock it was allotting to creditors.

Since the present earnings do no more than service the new capitalization, including a moderate dividend on the new common stock, it is plainly erroneous for the Debtor to contend that present earnings are more than those anticipated by the Commission when it set up this new capitalization.

(d) The computation which the Debtor (pp. 3-4) bases on earnings for the first 7 months of 1947 is also fallacious.

The fallacy is that the Debtor compares those earnings with the interest charges on the principal amount of the old debt, leaving entirely out of consideration that in 13 years no interest has been paid to secured creditors except for one distribution in 1945, and that, after applying that one distribution on accrued interest, the remaining unpaid accrued interest to date would amount to about $140,000,000. The Debtor has consistently sought to ignore this enormous accrued interest and to have the Debtor's rights determined as if this accrued interest had been paid, and it does so again in the computation now submitted. But the accrued interest has not been paid; it is ahead of stockholders' claims; it must be given recognition before stockholders

receive any recognition; it is only partially recognized in the present plan because there are not enough assets to recognize it in full; and a computation which ignores this vast amount of unpaid accrued interest is misleading and unworthy of consideration.

The earnings for the first seven months of 1947 have been at a slightly higher rate than those for 1946, but still, if earnings at that rate were to continue through the year 1947, they would not produce any extraordinary earnings or dividends for the new common stock and would be substantially below the levels of 1943 and 1944. However, it is well known that earnings for the first part of 1947 have not been normal for two reasons, one, because of the abnormally large movements of grain for export to Europe, and, two, because of the substantial increase in wages recently granted to non-operating employees and the substantial increase in wages expected to be granted to operating employees in the near future, which wage increases are in no way reflected in the earnings for the first part of 1947. These increases in wages will cause earnings sharply to decline in the remainder of 1947 and there is a certainty, at least, of a serious time lag between such wage increases and any rate increases which may be granted to offset them.

(e) The Debtor's arguments (pp. 7-9) that it has standing to apply for certiorari are unsound.

It should first be noted that in connection with the approval of the plan, the Debtor made no claim that there was any equity for stockholders and the Circuit Court of Appeals referred to this concession in affirming approval of the plan (157 F. (2d) 241, 245). In view of this concession by the Debtor, it has no standing in the subsequent confirmation proceedings which affect only creditors. The Section 77 cases now cited by the Debtor to show that other

debtors have been heard by this Court were cases where the debtor claimed there was an equity for its stock.

The Debtor's contention that it has a standing to apply for certiorari to review the order directing confirmation, notwithstanding that there is concededly no equity for the stock, is based on Section 77(c)(13) of the Bankruptcy Act from which the Debtor quotes only the provision that "the debtor" has the right to be heard in the proceeding. But that provision is that "the debtor, any creditor or stockholder," and other enumerated persons have the right to be heard. Certainly a stockholder or a creditor could not take an appeal from a decision relating to the rights of another party and not adversely affecting him, and the same must be true of the debtor. (*Cf. Missouri Pacific R. Co.* v. *Thompson,* 134 F. (2d) 139, C. C. A. 8, 1943.)

The very case upon which counsel for the Debtor relies, *In Re Keystone Realty Holding Co.,* 117 F. (2d) 1003, 1005 (C. C. A. 3, 1941), states, in referring generally to the right of appeal in Chapter X of the Bankruptcy Act, that under a similar provision of that Chapter creditors "adversely affected" have the right of appeal. The Debtor is not adversely affected by the allocation of securities among creditors when the Debtor has not claimed that there is an equity for the stock.

The lack of standing of the Debtor in the present situation is indicated by the following ruling of this Court in the *Denver & Rio Grande Western* case (328 U. S., at p. 520):

> "It would also follow that the objection of a stockholder, the Missouri Pacific Railroad Company, through its Trustee in reorganization, to a voting trust for future control of the debtor would be ineffective because this stockholder is eliminated from the reorganization by the valuation of the property and allocation of securities."

Conclusion.

The Debtor, consistently with the position it has taken for many years, seeks further delay in carrying through the plan in this 14-year-old reorganization proceeding. To support that effort, the Debtor presents a memorandum of the Interstate Commerce Commission filed in the *Missouri Pacific* case which has no application to the facts of the *Rock Island* case, presents a statement by four Federal legislators as to proposed legislation which adds nothing to what was before this Court in the *Denver & Rio Grande Western* case and was held by this Court not to warrant further delay, and presents misleading and fallacious computations as to the current earnings of the Rock Island, which ignore the $140,000,000 of unpaid accrued interest and the fact that the recent earnings are less than they were in 1943, 1944 and 1945 and are no more than are needed to service the new securities including a moderate dividend for the new common stock.

We submit that the additional material lends no support to the Debtor's petition for certiorari, and that the petition should be denied.

Respectfully submitted,

ROOT, BALLANTINE, HARLAN,
BUSHBY & PALMER,
31 Nassau Street,
New York 5, N. Y.

Attorneys for Metropolitan Life Insurance Company, as remaining member of the First and Refunding Group.

WILKIE BUSHBY,
JOSEPH SCHREIBER,
of Counsel.

ALEXANDER M. LEWIS,
of Counsel.

RATHBONE, PERRY, KELLEY & DRYE,
70 Broadway,
New York 4, N. Y.

Attorneys for Central Hanover Bank and Trust Company and George S. Hovey, Trustees for First and Refunding Mortgage 4% Bonds of The Chicago, Rock Island and Pacific Railway Company.

SANFORD H. E. FREUND,
of Counsel.

SHEARMAN & STERLING & WRIGHT,
20 Exchange Place,
New York 5, N. Y.

Attorneys for The National City Bank of New York, Trustee for Secured 4½% Bonds, Series A, of The Chicago, Rock Island and Pacific Railway Company.

EDWARD W. BOURNE,
of Counsel.

ALEXANDER & GREEN,
120 Broadway,
New York 5, N. Y.

FRANK H. TOWNER,
of Counsel.

WINSTON, STRAWN & SHAW,
First National Bank Building,
Chicago, Illinois.

Attorneys for Protective Committee for The Chicago, Rock Island and Pacific Railway Company General Mortgage Bonds due January 1, 1988.

JESSE E. WAID,
of Counsel.

WHITE & CASE,
14 Wall Street,
New York 5, N. Y.

WINSTON, STRAWN & SHAW,
First National Bank Building,
Chicago, Illinois.

FRANK H. TOWNER,
of Counsel.

Attorneys for Bankers Trust Company and R. G. Page, as Trustees of the General Gold Bond Mortgage of The Chicago, Rock Island and Pacific Railway Company, dated January 1, 1898.

BEEKMAN & BOGUE,
15 Broad Street,
New York 5, N. Y.

EDWARD K. HANLON,
of Counsel.

Attorneys for Protective Committee for the Holders of First Mortgage 4½% Bonds of The Rock Island, Arkansas and Louisiana Railroad Company.

CAHILL, GORDON, ZACHRY & REINDEL,
63 Wall Street,
New York 5, N. Y.

DANIEL JAMES,
of Counsel.

Attorneys for Protective Committee for Choctaw, Oklahoma and Gulf Railroad Company Consolidated Mortgage 5% Gold Bonds, and Choctaw and Memphis Railroad Company First Mortgage 5% Gold Bonds.

September 23, 1947.

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 184-9

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Debtor,

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, *as remaining member of the First and Refunding Group,* CENTRAL HANOVER BANK AND TRUST COMPANY, *et al., as Trustees,* THE NATIONAL CITY BANK OF NEW YORK, *as Trustee,* J. HAMILTON CHESTON, *et al.,* JOHN C. TRAPHAGEN, *et al.,* JAMES G. BLAINE, *et al.,*
Respondents.

PETITION OF DEBTOR-PETITIONER FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor-Petitioner
JOHN GERDES,
HENRY F. TENNEY,
Attorneys.

November 11, 1947.

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 184-9

IN THE MATTER

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor,

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, *as remaining member of the First and Refunding Group,* CENTRAL HANOVER BANK AND TRUST COMPANY, *et al., as Trustees,* THE NATIONAL CITY BANK OF NEW YORK, *as Trustee,* J. HAMILTON CHESTON, *et al.,* JOHN C. TRAPHAGEN, *et al.,* JAMES G. BLAINE, *et al.,*

Respondents.

PETITION OF DEBTOR-PETITIONER FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

The debtor respectfully petitions for a rehearing of the order denying its application for a writ of certiorari in the above entitled proceeding.

Mr. Justice Rutledge in his opinion concurring with the majority of this Court in denying the petition for certiorari, states that he does so because:

"The Commission's letter does not afford any adequate basis for reaching a contrary conclusion, and in the absence of any more positive or helpful suggestion upon the merits of the applications as made on the record before us, I agree with the Court that the petitions should be denied."

Since the denial of the application for a writ of certiorari, the debtor has made efforts to secure a "more positive or helpful suggestion" from the Commission. It wrote the following letter to the Chairman of the Commission:

October 28, 1947

Honorable Clyde B. Aitchison,
Chairman, Interstate Commerce Commission
Washington 25, D. C.

Re: The Chicago, Rock Island and Pacific Railway Company Reorganization

Dear Sir:

The debtor in the above proceeding respectfully requests the Interstate Commerce Commission to express publicly its view as to the desirability of a reconsideration of the present plan in the light of the "material changes in the situation as it affects the condition of the debtor" which were referred to in your letter to Chief Justice Vinson under date of October 9, 1947.

Since the aforesaid letter was sent, the United States Supreme Court has denied the applications for writs of certiorari, apparently on the ground (as appears from the opinion of Mr. Justice Rutledge) that your letter of October 9, 1947 "does not afford an adequate basis" for a grant of certiorari "in the

absence of any more positive or helpful suggestion upon the merits of the applications".

The rights of thousands of junior creditors of this debtor should not be sacrificed by a situation in which the Commission refuses to express its views on the merits of the plan in the light of changed conditions, and, because of such refusal, the courts refuse to pay any attention to the expressed attitude of the Commission that material changes in the situation have occurred in the condition of the debtor.

The debtor does not submit with this letter any data on the changes in conditions, since it is apparent that the Commission itself has recently examined the situation and has reached the conclusion that such changes have occurred. The Commission's view is amply supported by the recent earnings of the debtor and by its vastly improved physical and financial condition, to which reference is made by the Trustees in an advertisement which appeared on page 20 in the New York Herald Tribune, October 1, 1947, a copy of which is enclosed.

The time to make application to the United States Supreme Court for a rehearing of its refusal to grant writs of certiorari expires November 14, 1947. It is therefore respectfully urged that the Commission act on this request at the earliest possible moment in order that the matter may be presented to the Supreme Court before such date.

Yours very truly,

JOHN GERDES,
HENRY F. TENNEY,
Attorneys for The Chicago,
Rock Island and Pacific
Railway Company, Debtor.

The following letter was received in response to the foregoing:

October 31, 1947

Offices of
Charles D. Mahaffie
Commissioner

Messrs. John Gerdes and
Henry F. Tenney,
Attorneys for The Chicago, Rock Island &
Pacific Railway Company, Debtor
One Wall Street
New York 5, N. Y.

Gentlemen:

Your letter of October 28, 1947, addressed to the Chairman, has been referred to Division 4 for consideration. As we understand your suggestion, it is that the Commission should make further representations to the Supreme Court in connection with petitions to be filed asking the Court to reconsider its order of October 20 denying certiorari in the Chicago, Rock Island & Pacific Railway Company bankruptcy proceedings.

Division 4 has carefully considered your suggestion and has authorized me to advise you that it does not see its way clear to comply with it.

Yours very truly

CHARLES D. MAHAFFIE
Chairman, Division 4

As it was apparent that the Commission misunderstood the debtor's letter of October 28, 1947, the following letter

was sent to the Commission under date of November 3, 1947:

November 3, 1947

Honorable Charles D. Mahaffie,
Chairman, Division 4
Interstate Commerce Commission
Washington 25, D. C.

Re: The Chicago, Rock Island and Pacific Railway Company Reorganization

Dear Sir:

Your prompt answer of October 31, 1947 to our letter of October 28, 1947 is greatly appreciated.

We understand your reluctance to make further representations to the Supreme Court in the Rock Island situation, since there are now no proceedings pending before it. We therefore refrained, in our letter of October 28, 1947, from asking you to submit anything to the Court. The parties, however, desire to know the opinion of the Commission as to whether the "material changes in the situation as it affects the condition of the debtor" are such as to warrant changes in the Rock Island plan. We therefore respectfully request you to give us your views on this matter.

Yours very truly,

JOHN GERDES
HENRY F. TENNEY,
Attorneys for The Chicago,
Rock Island and Pacific
Railway Company, Debtor.

The following reply has just been received from Commissioner Mahaffie:

November 6, 1947

Offices of
Charles D. Mahaffie
Commissioner

Messrs. John Gerdes and
Henry F. Tenney,
Attorneys for The Chicago, Rock Island &
Pacific Railway Company, Debtor
One Wall Street
New York 5, N. Y.

Gentlemen:

This will acknowledge receipt of your letter of the 3rd instant in which you ask for my views as to whether the "material changes in the situation as it affects the condition of the debtor" are such as to warrant changes in the Rock Island plan.

As stated in my letter of October 31, 1947, Division 4 had authorized me to advise you that it did not see its way clear to comply with the request in your letter of October 28, 1947. Under the circumstances, it would be inappropriate for me to express any personal views concerning the matter. Expression of a Commissioner's personal views regarding a proceeding is rather plainly treated in the Court's opinion in Minneapolis & St. Louis R. R. Co. v. Peoria & P. U. Ry. Co., 270 U. S. 580, 585. Speaking of an order of the Commission, the Court stated that "it cannot be affected by what a member of the Commission may declare informally was intended".

Yours very truly,

CHARLES D. MAHAFFIE
Commissioner

As the time to file this application for a rehearing expires on November 14, 1947, it is no longer possible, in advance of the filing of this application, to pursue the matter with the Commission to obtain its definitive views on the question as to whether the "material changes in the situation as it affects the condition of the debtor" are such as to make it desirable, in the opinion of the Commission, to reconsider the Rock Island plan, although Commissioner Mahaffie's letter of November 6th clearly misconstrues the debtor's request as being a request for a personal opinion rather than a request for the views of the Commission.

The reluctance of the Commission to express its view as to the necessity for changes in the plan to meet changed economic conditions is apparently due to a reluctance to interfere with court processes. An expression of its view could have effect upon the court proceedings only if its view is that the plan should be changed. We may therefore justifiably draw the conclusion that this is the view which it would express if requested by the Court. Obviously, an expression by the Commission of the view that the plan should not be changed would not interfere with the opinion expressed by the Court, and there would be no hesitancy on the part of the Commission in expressing such a view.

In order to avoid grave injustice, the debtor respectfully asks this Court to request the Commission to file a brief with it specifying whether the Commission deems changes should be made in the plan to meet the change in the economic status of the debtor, and specifying the changes, if any, which it deems should be made. In the meantime, it is requested that this Court withhold a decision on this application for a rehearing until the receipt by it of such brief from the Commission.

The question of whether it is proper for the Commission to file a brief without a prior request from the Court

is purely a matter of procedure. Such a procedural question should not stand in the way of this Court's ascertaining exactly what the Commission's views now are. A grave injustice may be done to thousands of investors if this Court does not request the Commission to state its views on the plan.

The debtor asks the Court to take no final action on this petition without asking the Commission to make a definite statement of its present position.

Respectfully submitted,

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor-Petitioner.

JOHN GERDES,
HENRY F. TENNEY,
Attorneys.

November 11, 1947.

Certificate

WE, JOHN GERDES and HENRY F. TENNEY, counsel for The Chicago, Rock Island and Pacific Railway Company, debtor-petitioner, hereby certify that this petition for rehearing is filed in good faith and not for delay.

JOHN GERDES,
HENRY F. TENNEY.

November 11, 1947.

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 184-9

IN THE MATTER
of
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, *et al.*, as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, *et al.*, JOHN C. TRAPHAGEN, *et al.*, JAMES G. BLAINE, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION OF DEBTOR FOR REHEARING OF ORDER DENYING ITS APPLICATION FOR WRIT OF CERTIORARI.

The anomalous petition for rehearing filed by the Debtor consists of a request that this Court call upon the Interstate Commerce Commission for "a definite statement of its present position". The petition does not in any way address itself to the merits of the case.

Similar requests by the Debtor (September 11, 1947 brief, pp. 6, 10), by the Preferred Stock Committee

(October 2, 1947 brief, pp. 9-19), and by Axelrod *et al.* (October 7, 1947 brief) were before this Court on October 20, 1947, when the Court rejected the requests by denying the three applications for writs of certiorari to review the confirmation of the Rock Island reorganization plan. Seven members of the Court concurred in the action by the Court (Mr. Justice Rutledge in a concurring opinion). Two Justices dissented. No ground is presented by the Debtor for the Court's reversing the action which it so recently took.

Furthermore, the Debtor ignores the fact that the Commission in its letter to this Court dated October 9, 1947 expressly stated that, while the Commission had not attempted to appraise the effect of changes in conditions so far as they might affect the provisions of the Plan, it understood that these "are developed at length in the record in the courts". The record before this Court showed affirmatively that there had been no such changes in conditions as would affect the fairness of the Rock Island Plan; and Mr. Justice Rutledge, in his concurring opinion, summarized the facts and concluded that there had been no changes in conditions "which, within the rulings of the *Rio Grande* cases, would require reopening of this 14-year-old reorganization and starting down the long road to consummation again". The issue concerning changes in conditions was developed in the record before this Court, it was an issue for decision by the Court, and the Court has decided it. Accordingly, there is no basis whatever for delaying the reorganization in order to await the expression of the views of the Interstate Commerce Commission on an issue which this Court has already decided.

We should also point out that the Debtor, in petitioning this Court for rehearing, represents stock which has ahead of it enormous claims of secured and unsecured creditors

which went into default over 14 years ago; that the claims of secured creditors will have an unsatisfied deficiency under the present Plan of over $106,000,000; and that the claims of unsecured creditors will bring the total unsatisfied deficiency of creditors to more than $145,000,000. In this situation, there can obviously be nothing left for the present stock. The Debtor therefore has no standing to seek further delay.

The Debtor's petition for rehearing should be denied.

Respectfully submitted,

Root, Ballantine, Harlan,
Bushby & Palmer,
31 Nassau Street,
New York 5, N. Y.

Attorneys for Metropolitan Life Insurance Company, as remaining member of the First and Refunding Group.

Wilkie Bushby,
Joseph Schreiber,
of Counsel.

Rathbone, Perry, Kelley & Drye,
70 Broadway,
New York 4, N. Y.

Attorneys for Central Hanover Bank and Trust Company and George S. Hovey, Trustees for First and Refunding Mortgage 4% Bonds of The Chicago, Rock Island and Pacific Railway Company.

Alexander M. Lewis,
of Counsel.

Shearman & Sterling & Wright,
20 Exchange Place,
New York 5, N. Y.

Attorneys for The National City Bank of New York, Trustee for Secured 4½% Bonds, Series A, of The Chicago, Rock Island and Pacific Railway Company.

Sanford H. E. Freund,
of Counsel.

ALEXANDER & GREEN,
120 Broadway,
New York 5, N. Y.

EDWARD W. BOURNE,
of Counsel.

WINSTON, STRAWN & SHAW,
First National Bank Building,
Chicago, Illinois.

FRANK H. TOWNER,
of Counsel.

Attorneys for Protective Committee for The Chicago, Rock Island and Pacific Railway Company General Mortgage Bonds due January 1, 1988.

WHITE & CASE,
14 Wall Street,
New York 5, N. Y.

JESSE E. WAID,
of Counsel.

WINSTON, STRAWN & SHAW,
First National Bank Building,
Chicago, Illinois.

FRANK H. TOWNER,
of Counsel.

Attorneys for Bankers Trust Company and R. G. Page, as Trustees of the General Gold Bond Mortgage of The Chicago, Rock Island and Pacific Railway Company, dated January 1, 1898.

BEEKMAN & BOGUE,
15 Broad Street,
New York 5, N. Y.

EDWARD K. HANLON,
of Counsel.

Attorneys for Protective Committee for the Holders of First Mortgage 4½% Bonds of The Rock Island Arkansas and Louisiana Railroad Company.

CAHILL, GORDON, ZACHRY & REINDEL,
63 Wall Street,
New York 5, N. Y.

Attorneys for Protective Committee for Choctaw, Oklahoma and Gulf Railroad Company Consolidated Mortgage 5% Gold Bonds, and Choctaw and Memphis Railroad Company First Mortgage 5% Gold Bonds.

DANIEL JAMES,
of Counsel.

November 14, 1947.